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# PRACTICAL GUIDE,

TO

## The Quarter,

AND OTHER,

### SESSIONS OF THE PEACE.

ADAPTED TO THE USE OF

YOUNG MAGISTRATES, AND GENTLEMEN OF THE  
LEGAL PROFESSION,

AT THE

COMMENCEMENT OF THEIR PUBLIC DUTIES.

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BY THE AUTHOR OF

*"A Practical Exposition, of the Office and Duties of a  
Justice of the Peace,"*

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LONDON:

PRINTED FOR REED AND HUNTER, LAW-BOOKSELLERS,  
BELL-YARD, LINCOLN'S-INN.

1815.



## DEDICATION:

*To His Grace the DUKE of PORTLAND.*

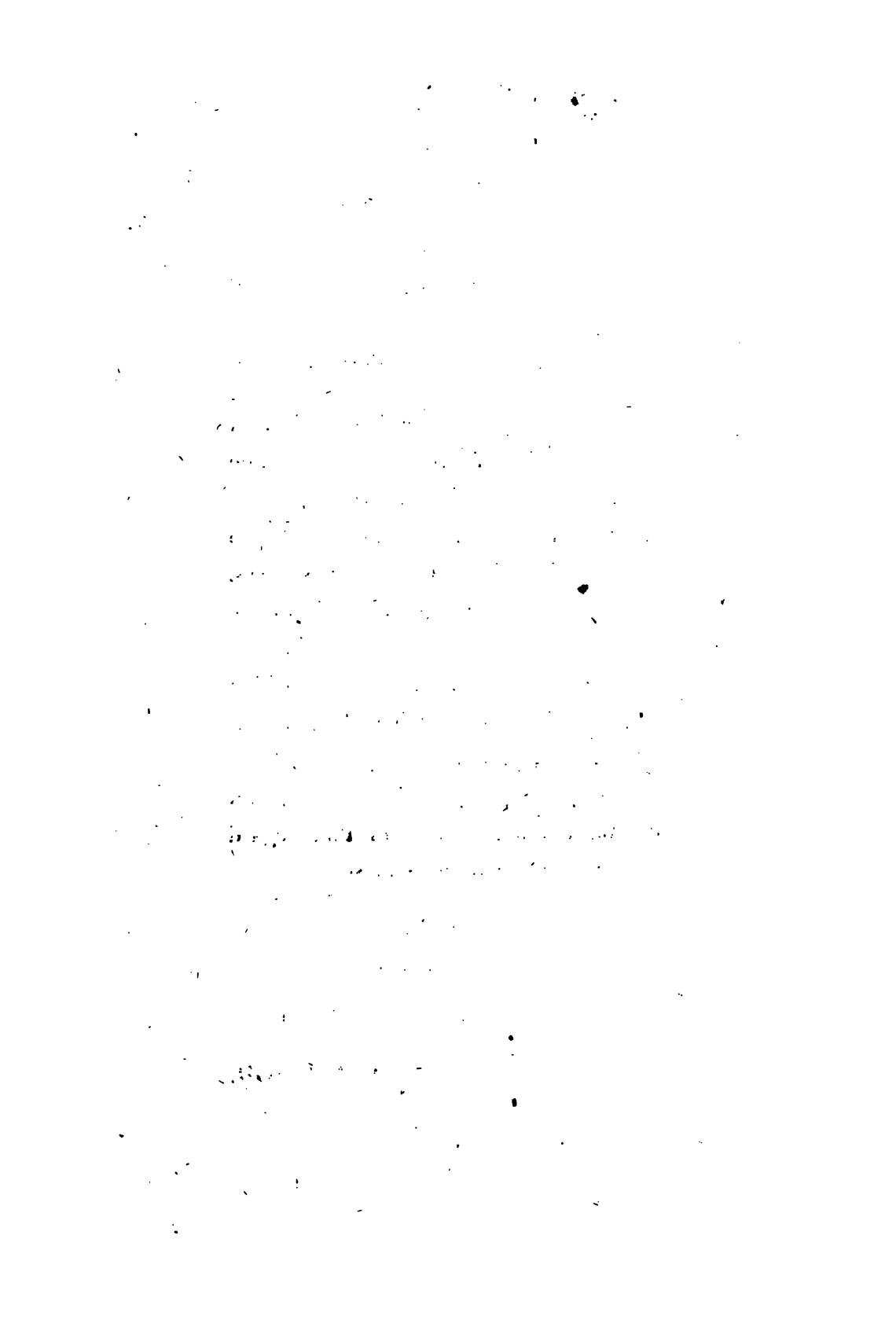
FAVORABLE as was the reception, and rapid as has been the sale, of my Treatise on "The Office and Duties of a Justice of the Peace," I am not presumptuous enough to attribute to intrinsic merit alone its extraordinary success. I assumed the liberty of confiding it to the protection of your Grace; and the result has more than fulfilled the expectations, with which I flattered myself in the choice of a Patron. Thus encouraged, pardon me, my Lord Duke, if I again trespass upon your indulgence, and offer to you another tribute of that regard which induces me to subscribe myself

Your Grace's,

Most devoted,

And obedient Servant,

THE AUTHOR.



## PREFACE.

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If any apology be necessary for the Author of the following pages having obtruded himself upon the Public a second time, within so short a period, it must be sought in the flattering reception which his "*Practical Exposition of the Office and Duties of a Justice of the Peace*" met with; especially from those for whose particular service it was intended. That work was, indeed, a *voluntary* offer, but compiled, nevertheless, under some circumstances of considerable disadvantage, and presented to the world with correspondent diffidence. The *present* volume has been *called for* by very many persons, in different districts of the Kingdom, to whom the author is known only through the medium of his former work. The design of it is to supply to young Magistrates that information, respecting their *public* duty, as mem-

bers of the Court of Quarter Session, which, without some such guide, can only be acquired from previous professional pursuits, or gradually obtained by laborious attention and long experience.

Early habits, as well at the Bar, as on the Bench, had not permitted the Author to discover the difficulties, with which those, who have neither of these advantages, have to struggle, before they are competent to take an active part in the business of a Session. In these having been pointed out to him, with an accompanying request that he would turn his attention to the removal of them, originated the following effort; for the success of which he is reasonably solicitous, as a matter of utility to others; but without that anxiety which must be the concomitant of a publication, on which a writer hopes to found a reputation for himself.

Of its qualities he does not consider it necessary to say more, than that, having in contemplation principally the instruction of inex-

perienced Magistrates, its contents are on the whole, general and elementary, except in those instances where he found it impossible to be intelligible without descending to minute examination, and technical illustration ;—but at the same time he hopes he may, without presumption, observe, that as all the common proceedings of a Court of Quarter Session are regularly and distinctly traced, from its commencement to its conclusion ;—and not only so indeed, but even to matters posterior to, but dependent upon, and flowing, as it were, out of it ; even professional gentlemen, (at least in the early stages of their career) by interleaving it for the reception of precedents and memoranda, may, *make* it, if they do not *find* it, a very useful auxiliary. Respecting the authorities cited, some brief explanation may perhaps be right. Generally speaking, the most recent *decisions*, where the subject under consideration was to be *so* illustrated, have been resorted to ; but that mode of selection has not been by any means the uniform or unvaried criterion ; for in very many instances, where the luminous determinations of earlier judges have remained

**uncontroverted, or have been confirmed, the strongest or most apposite case, according to the judgment of the author, has been selected for the example, without reference to the point of time in which the authority was established.**

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A

# PRACTICAL GUIDE,

&c. &c. &c.

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## CHAPTER I.

### THE SESSIONS OF THE PEACE.

*Herein of the different Descriptions of Sessions.*

—*Their Constitution and Continuance.—The Manner of convening them.—The Time and Place of holding them.—Form of the Precept to the Sheriff.—Of the Sheriff's Warrant to the Bailiffs.—Style of the Sessions, &c.*

THE term “*SESSION of the Peace*” is used Sessions what. to designate “a sitting of Justices of the Peace, for the execution of those purposes which are confided to them by their Commission, and by divers acts of Parliament.” The words “*of the Peace*” are added to distinguish *these Sessions* from all others, of which there are many kinds; as *ex. gr.* Sessions of Parliament, Great Sessions of Wales, Court of Session in Scotland, Session of weights and measures in London, and others.

Sessions of the Peace may be for jurisdictions of greater, or less extent, according to the pleasure of the Crown. Extent of jurisdiction.

B

The King may grant a Commission of the Peace for a County, and under such commission the jurisdiction of the Justices named in it will extend over the whole of such County ; or he may grant it for any particular district or portion of a County, exclusive of the jurisdiction of the Justices of the County at large ; or he may by charter give the power of acting as Justices to certain Officers in towns corporate, cities, and other places. In the latter cases however, the Justices of the County at large, in which such district, town corporate, city, or other place, shall happen to be situate, can only be prohibited from interfering by special words in the commission or charter of the inferior jurisdiction, called technically “ *a non intromittant clause* ”.

In most cities and corporate towns there are Sessions held before Justices of their own, whether the County Justices be excluded, or not ; and such Sessions have authority exactly similar to the Sessions of a County, except in a very few instances ; one of the most considerable of which is in appeals from orders of removal of the Poor, which tho’ *made* by the Justices of the City or Corporation, must be carried by *appeal* before the Justices of the County by 8 & 9 Will. 3. c. 30.

Sessions are of four kinds or descriptions. *Petit* ; or, as they are usually denominated, *Petty, Special, General, and Quarterly*.

PETTY SESSIONS are when two or more Justices of the Peace, of their own mere motion, meet together, to transact such business as, either by the positive direction of their commissions, or by statute, requires the presence of more than one ; or where it is of such difficulty, or importance, that its interest points out the propriety of such a concurrence. Any attempt to illustrate this position, in either of its divisions, by an enumeration of instances, would either be liable to perplex by its prolixity, or might tend to make Justices overlook the cases which were casually omitted, in which the attendance of *two* Justices is rendered necessary. Suffice it to observe then, that in most of the Statutes passed *before* the Revolution, *two* Justices are requisite for all processes respecting the regulation of the Poor ;—for many of the convictions under statutes made for the protection of particular trades ; and indeed generally for all summary convictions. Also that *since* that period, where *new* Statutes have been made, on subjects which were previously cognizable by Justices of the Peace, the ancient mode of proceeding, that is, before *two* Justices, has been very generally preserved—at least the deviations are less numerous than the instances of acquiescence.

Under the second division of the position which has been just laid down, little need be said ; since common discretion will point out

to every man of discernment and reasonable diffidence, the instances, in which he ought to wish only to *share* responsibility. It is almost unnecessary to point out particularly, as examples, such cases as concern large pecuniary interests, persons of eminent station in society, questions that admit of much *ambiguity*, or those of importance in which there lies no remedial process of *any* description, from the determination of the Justice who takes cognizance of the subject.

Special.

How convened.

SPECIAL SESSIONS are extraordinary meetings of Justices, convened by *some proper authority*, for a *special* purpose. Of this description (and not, as they are often erroneously denominated, *petty sessions*) are those directed by statute to be holden for the appointment of Overseers of the Poor, and of Highways, as also for the licencing of Ale-houses. The manner of convening these, and other, Special Sessions, which are ordered by Statute, must of course be in conformity with the words of the statutes themselves, and are generally by precept under the hands and seals of two Justices of the County, Division, Riding, or Liberty; but Special Sessions, in the ordinary acceptation of that expression, which are not particularly directed by any Statute for any particular or specific purpose, may be convened by the **Custos Rotulorum** of the County, Division, Riding, or Liberty, by the Clerk of

the Peace of such County, Division, Riding, or Liberty, as the Deputy of such *Custos Rotulorum*; or by any *one*, or more, Justices of the County, Division, Riding, or Liberty. The immediate instrument, by which they are convened, is a precept to the Chief Constables, and a notice addressed to all the Justices *acting* for the County, Division, Riding or Liberty. The purpose, for which such Special Session is convened, should also be specified in such notice. If these formalities be not observed, however numerous the meeting of Justices may happen to be, it will amount to no more than a Petty Session, and therefore will not satisfy the words of any Statute, public, or private, general, or local, which authorizes the calling of a *Special Session* for any particular purpose.\*

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\* An example of this occurs under the Statute of 13. Geo. 3. c. 78, for widening, diverting, and changing high-ways;—by which, in the 19th section, it is directed that the acts to be done for this purpose shall be at a *Special Session* convened for the occasion:—another under sect. 10. of the Insolvent Act, of 54. Geo. 3. Other examples from private acts for local purposes, such as for certain embankments, canals, and other improvements, might be adduced. In any of these cases to have left such matters to the decision of a Petty Session, properly so called, that is, a Session of any two Justices, who might be *privately* convened, would have been, in many cases, to have made the *Custos Rotulorum*, or some other great Land Proprietor, who had perhaps the greatest interest in the subject to be decided, to all intents and purposes, (from the influence he may reasonably be supposed to possess,) the Judge in his own cause.

An unaccountable confusion has prevailed in almost all writers on the subject of Sessions, respecting the distinction between *special*, and *petty* Sessions. Even so late as the Commentaries of Blackstone, scarcely any discrimination is made in treating of their respective duties, or even in the occasions for which they are summoned, or in the manner of summoning them.

**Place to be specified in the Precept.** The place where such Special Session is to be holden, must also be specified in the notices; and this any of the persons who have authority to convene them, have also the necessary authority to decide, so that it be a place within their jurisdiction.\*

**General.** **GENERAL SESSIONS.**—These differ from *Special* Sessions, in as much as, although they are specially summoned, they are not for the execution of any *particular branch* of the Justices' authority, or for any *particular business exclusively*, but for all general purposes for which Quarter Sessions are directed to be holden. If convened for any *special* purpose therefore, and *general* purposes are intended to be excluded, however custom may have sanctioned the miscalling them **General Sessions** in common parlance, they are in fact only *Special Sessions*. They differ from *Quarter Sessions*, inasmuch as they are not limited to any particular time,

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\* Dalt. c. 185.—Lamb. 382.

but are directed to be holden "so often as need be."\*

They may be convened by the Custos Rotulorum, and any other of the Justices; or by any two Justices within the jurisdiction, *one being of the quorum*, by precept to the Sheriff to summon such Session, to return a Jury, and give notice throughout his Bailywick to all persons whose duty it is to attend, for the *general* execution of their authority.†

And that the Sheriff may have sufficient time to proclaim the Sessions, to summon and return the several Juries, and to warn all officers and others that have business there to *Teste of the Precept.* attend;—the precept should bear *teste*, (or date) fifteen days before the return, and ought forthwith to be delivered to the Sheriff.‡

And if two such Justices make a precept for a General Session of the Peace, all their fellow Justices cannot discharge it by their Superseendas; nor can it be discharged, but by a *Sub-Precept.* <sup>How dis-</sup> persedeadas out of Chancery directed to the <sup>charged.</sup> Sheriff.§

But it is not sufficient for the convening a *General Session of the Peace*, that the precept run under the name of *one* Justice only, even though it be that of the Custos Rotulorum, for

\* 2 Hen. 5. St. 1. c. 4.—Hawk. c. 8.

† Lamb. 382—Hawk. c. 8.—Tit. Justice.

‡ 2 Shaw's Just. 174.

§ Lamb. 375.—Cromp. 107,

the words of the *mandamus* clause in the Commission are "that the Sheriff shall cause a Jury to appear at such days, and places, as the said Justices, *or any two*, or more of them, as aforesaid shall appoint.\*

Where there  
is no Pre-  
cept.

It should appear that though there be no precept in writing to the Sheriff, or an irregular precept, yet if a Session be actually holden, the proceedings had there will be good. No persons can be *compelled* to attend, if no precept be issued; but if they do in fact attend, and the duties of a Session be regularly performed, the irregularity in convening it is cured thereby.†

Where there  
are two or  
more Pre-  
cepts.

It has been doubted whether, if two, or more sets of Justices appoint two, or more, General Sessions, to be holden at the same time, any, or all, and which of them, are good. But such an event may happen without either mistake, or misbehaviour in the Justices, and there seems to be no reason why all such Sessions should not be legal and of equal authority.

Appearance, and service, at any one of them, would indeed, in that case, operate as a discharge of service at the others.‡ But the arguments that have been used to shew that such duplicates of Sessions would themselves be illegal, have been drawn from a supposed ana-

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\* Lamb. 377.

† 2 Ld. Raym. 1238.

‡ Com. Dig. tit. Just.

logy to the cases of *Special Sessions*, and those too directed by statute, which do not apply.\*

But if such precepts were multiplied wantonly or for sinister purposes, the Justices issuing them would subject themselves to be punished by information in *B. R.* or by having their commissions superseded by the Lord Chancellor.†

**GENERAL QUARTER SESSIONS**, are such <sup>Quarterly.</sup> Sessions as are regularly holden every quarter of a year, under the authority of Statute.

The 12. Rich. 2. c. 10. directs, that “the Justices shall keep their Sessions in every quarter of the year at least, and by three days, if need be, on pain of being punished according to the discretion of the King’s Council, at the suit of every man that will complain.”

And by 2. Hen. 5. St. 1. c. 4. The particular time in every quarter of a year shall be as follows; “to wit, in the first week after the feast of St. Michael; in the first week after the Epiphany; in the first week after the clause of Easter; and in the first week after the translation of St. Thomas the Martyr (Thomas a Becket) *and more often if need be.*”

A recent Statute,‡ however, after reciting that it would contribute to the convenience of those who have to attend them, if the time

\* 4 Term Rep. 451.

† Dalt. c. 185.

‡ 54 Geo. 3. c. 84.

of holding the Michaelmas Quarter Sessions were altered, directs that for the future "all Quarter Sessions for the Michaelmas Quarter shall in every year be holden, for every County, Riding, Division, City, Borough and Place, within in England and Wales, and for Berwick-upon-Tweed, in the first week after the eleventh day of October, instead of at the time now appointed for holding the same; and that all acts, matters and things, done, performed and transacted, at the time appointed by this Act for holding the said Michaelmas Quarter Sessions, shall be as valid and binding to all intents and purposes as if the same had been done, performed and transacted, at the time heretofore appointed for the holding of such Sessions."

But London and Middlesex are excluded from the operations of the Stat. by Sect. 2.

*Variations from the general Rule.* If the feast day fall on Sunday, the Session shall be holden in the week following, and not the same week.\*

But in point of fact, the Quarter Sessions are variously holden in several counties, some on one day, some on another; and they are all equally good, for the Stat. of Hen. 5, is only directory, and in the affirmative, and, therefore, if they be only holden according to the general directions of the Stat. of Rich. 2, they will be valid.†

\* 2 Hale's Hist. 49.

† Id. 50.

In Middlesex it is provided by Statute specially, that Sessions shall be holden twice in the year at least, and oftener if need be;\*— and, in fact, from the necessity of the case, they are actually holden eight times in the year.†

The jurisdiction and authority of the Court of General Quarter Sessions makes the subject of a separate Chapter hereafter, and, therefore, it is sufficient merely to observe, that by 34 Edw. 3. c. 1. it extends to the trying and determining all felonies and trespasses whatsoever. This general power, however, is to be understood with limitation, especially, that it does not extend to the trial of new offences erected by Act of Parliament, unless the particular Statute which makes the offence, gives the cognizance of it to the Justices in Session.‡

The subjects which have been made especially cognizable in this way, are, *generally*, such as relate to Apprentices, the Game, Highways, Publicans, the settlement and provision of the Poor, Servants, and Vagrants.

If it happen on the day appointed for holding the Session, that a sufficient number of Justices (two, one whereof is of the Quorum) do not appear, it is usual to suffer the Session for that quarter to be lost. But if public convenience require it, a precept may be issued

\* 14. Hen. 6. c. 4.

† Crown Circ. Comp. 31.

‡ Salk. 406.—*Id. Raym.* 1144.

to the Sheriff to convene a Session under the hands and seals of two Justices, one being of the Quorum, and to return a Jury; and if such Session be *within that Quarter*, that is to say, previous to the day for the *succeeding* quarterly Session pointed out by the Stat. of Hen. 5, it will be a good Quarter Session, for that quarter in which the previous Session was lost.\*

This point may occasionally be of considerable importance; because, altho' for many purposes

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\* 2. Hawk. c. 8.—But tho' the Stat. of Hen. 5, as has been already observed, after directing the specific periods at which the four Quarter Sessions shall be holden, proceed to say, that they shall be holden “ oftener if need be,” it does not mean to direct that more than one *original* Quarter Session shall be within one quarter; but merely that, after being summoned and *actually holden*, if the occasions of the County or other district, require it, *that* Session shall be adjourned from time to time as such occasion may render convenient, and that these adjournments are what the words “ or oftener, if need be,” refer to. This decision does not interfere with what has just been laid down, viz. that if, for any cause, the first summoned regular Quarter Session be *not actually holden*, another original Quarter Session may be summoned *within that Quarter*, which will be good, as well as any adjournments of it. Under this explanation, the following cases are compatible with the doctrine laid down by Hawkins, and lead to the conclusions here drawn.

Hil. Term. 20 Geo. 2. appeal was made to the Quarter-Session, held April 7, against an order of removal. The Session was adjourned to April 9, when for want of a sufficient number of Justices nothing was done. April 11th, a Session was held, and adjourned to the 14th, when the appeal was allowed. It was moved to quash the order of Session, as made without jurisdiction, the Session ending for want

a *general* Session might be sufficient, where any act is directed to be done at a **GENERAL QUARTER Session**, the formalities incident to that particular species of Session may be necessary to be observed. This case may not unfrequently happen respecting appeals given by divers statutes, which are generally directed to be to the next *Quarter Sessions* of the Peace. In such case a *General Session*, which was not also a *Quarter Session*, could not entertain them.\*

Whenever holden, the whole Session, al- <sup>Continuance</sup> tho' it may continue two, or more, days, is, <sup>for more</sup> than one day in point of law; considered as of one day. Hence it follows that the Justices may change

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of an adjournment on the 9th; and of that opinion was the Court, for the words in stat. 2. Hen. 5, c. 4, *and more often if need be*, were never considered as giving more than one *original Session* in a quarter, but only empowering adjournments. The country must take notice of adjournments, but are not supposed to expect a new Session till the usual time.—Order of Session quashed. 2 Str. 1263.

So in the case of *R. v. West Torrington*, Tr. 22 and 23 Geo. 2, the Session was held at Kirton, and from thence adjourned to Caistor, at which place no Session was held pursuant to the said adjournment;—afterwards a Session was held at Horncastle; and the appeal was heard and determined there. **By THE COURT.** The Session at Horncastle could not take up the appeal for want of jurisdiction: a Quarter-Session must be holden four times in a year, as directed by statute; and it may be adjourned from time to time, and from place to place; but if it is once dropped, it cannot be resumed. *Burr. S. C.* 293.

\* 15. *Ests. R.* 632.

Orders may their opinions at any time while such Session be altered. *continues, and may alter their orders.\**

Business not concluded. But if, from the Justices being equally divided, or other cause, no conclusion be come to, and no adjournment take place, no order on any thing that may have come before them, can be made at a *subsequent* Sessions.†

Adjournments.

Wherefore, in the event of an equal division of the Justices, it is proper for the Clerk of the Peace to enter an adjournment.

The Places where to be holden.

The Justices who issue the precept to convene a Quarter Session, may name any place within the County, Division, Riding, or Liberty, for which it is summoned, as that where it is to be holden, according to their discretion; and thither all Officers and Suitors of the Court will be bound to give their attendance.‡

In Counties, wherein the situation of the chief town is not central, or the population is very unequally distributed in the different parts, the greatest portion being at a distance from the County town, it is usual, as it is both lawful and expedient, to hold the Sessions successively at two or more of the principal places within the County, where proper accommodations for the purpose are to be obtained. In other Counties where similar circumstances exist, it is usual to adjourn every Session from one quarter of the County to another.

\* 2 Salk. 606.

† 2 Bott. 713.

‡ Lamb. b. 4. c. 2.—Dalt. 185.

*Form of a Precept to summon a Session.*

“ We A. B. and C. D. Esqs.,  
 ..... } “ two of the Justices of our Sov-  
 “ reign Lord the King assigned to keep the  
 “ Peace in the County of \_\_\_\_\_  
 “ aforesaid, and also to hear and determine  
 “ divers felonies, trespasses, and other misde-  
 “ meanors committed in the same County, one  
 “ of us being of the Quorum, to the Sheriff of  
 “ the same County, greeting : On the behalf of  
 “ our said Sovereign Lord the King, we com-  
 “ mand you, that you omit not, by reason of any  
 “ Liberty within your County,\* but that you  
 “ enter therein, and that you cause to come be-  
 “ fore us, or some other Justices assigned to  
 “ keep the Peace in the said County, and also  
 “ to hear and determine divers felonies, tres-  
 “ passes, and other misdemeanors in the said  
 “ County committed, on \_\_\_\_\_ the \_\_\_\_\_day of  
 “ \_\_\_\_\_ now next ensuing, at the hour of \_\_\_\_\_  
 “ in the forenoon of the same day, at \_\_\_\_\_  
 “ in the said County, twenty and four good and  
 “ lawful men of the body of the County afore-  
 “ said, then and there to enquire, present, do,  
 “ and perform, all and singular such things,

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\* If there be a Liberty, or other Franchise, in the County, possessing an exclusive jurisdiction, that is to say, a jurisdiction in which the Justices of the County at large are prohibited from interfering, it will be proper, as it is usual, to add in this place, *(except the liberty of \_\_\_\_\_ within the same.)* Cro. Cir. Com.

" which on the behalf of our said Sovereign  
 " Lord the King, shall be enjoined to them;—  
 " also that you make known to all Coroners,  
 " Keepers of Gaols, and Houses of Correction,  
 " High Constables and Bailiffs of Liberties,  
 " within the County aforesaid, that they may be  
 " then there to do and fulfil the things which,  
 " by reason of their offices, shall be to be done.  
 " Moreover, that you cause to be proclaimed  
 " through the said County in proper places  
 " the aforesaid Session of the Peace, to be  
 " holden at the day and place aforesaid, and  
 " do you be then there to do and execute those  
 " things which belong to your office. And  
 " have you then there as well the names of the  
 " Jurors, Coroners, Keepers of Gaols, and  
 " Houses of Correction, High-Constables and  
 " Bailiffs, aforesaid, as also this precept.

" Given under our hands and seals at ——  
 " in the County aforesaid, the —— day of ——  
 " in the —— year of the reign of ——"

When the Sheriff shall have received this precept, it becomes his duty to direct several warrants to the bailiffs of liberties and hundreds, containing the substance of it in the following form.

{ " P. Q. Esquire, Sheriff of the  
 ..... } " County aforesaid, to G. H. bai-  
 " liff of the hundred of —— in the said County,  
 " greeting: By virtue of a precept under the

“ hands and seals of A. B. and C. D. Esquires,  
“ two of his Majesty's Justices, appointed to  
“ keep the Peace in the said County ; and also  
“ to hear and determine divers felonies, tres-  
“ passes, and other misdemeanors, committed  
“ in my said County, one of them being of  
“ the *Quorum*, to me directed.

“ These are in his Majesty's name to will  
“ and require you, that you forthwith make  
“ known by open proclamation, in every mar-  
“ ket town, and all other places convenient  
“ within the hundred of ———, aforesaid, that  
“ the next general Quarter Session of the Peace  
“ of, and for, the County aforesaid, is to be  
“ holden and kept at ——— in the town of  
“ ——— in the County aforesaid, on Wednes-  
“ day, the ——— day of ——— now next ensu-  
“ ing, at the hour of nine of the clock in the  
“ forenoon of the same day ; and that you give  
“ notice to all Justices of the Peace, coroners,  
“ keepers of gaols, and houses of correction,  
“ and high constables of the said hundred, that  
“ they be then and there present, to do and  
“ perform that which to their several offices  
“ doth appertain : And that all those who  
“ ought to prosecute any prisoner or prisoners  
“ in the gaol of the said County, or who are  
“ bound over then to appear and answer, be  
“ then, and there, present, to prosecute against  
“ them according to law : And also that you  
“ summon and warn the persons whose names

## QUARTER SESSIONS.

" are underwritten, that they be then, and there,  
 " present to serve on the grand jury, and to in-  
 " quire on his Majesty's behalf, for the body  
 " of the County aforesaid, for all such matters  
 " and things as shall be then, and there, given  
 " them in charge: and also that you summon  
 " and warn the persons underwritten, being  
 " able and sufficient freeholders of the said  
 " hundred that they be then, and there, pre-  
 " sent to serve on the petty jury for his Ma-  
 " jesty's service: And that yourself be then, and  
 " there, present to make return thereof. And  
 " herein neither you nor them may fail, at your  
 " and their perils. Given under the seal of  
 " my office the —— day of —— in the  
 " —— year of the reign of our sovereign Lord  
 " George the Third, by the grace of God of  
 " the united Kingdom of Great Britain and  
 " Ireland, King, defender of the faith, &c.  
 " and in the year of our Lord ——."

Then the Sheriff makes his return of the  
 summons to the Sessions, thus:

" The execution of this writ appears in cer-  
 " tain schedules to this writ annexed."

" P. Q. Sheriff."

To this are annexed divers pannels fairly in-  
 grossed on Parchment, containing the names  
 of the Jurors, &c.

*The Style of the Sessions.*

“ THE General Quarter Ses-  
“ sions of the Peace holden at  
“ \_\_\_\_\_ in the town of \_\_\_\_\_ in and for the  
“ said County on the \_\_\_\_\_ day of \_\_\_\_\_ in  
“ the \_\_\_\_\_ year of the reign of our Sovereign  
“ Lord George the Third, of the United King-  
“ dom of Great Britain and Ireland, King,  
“ defender of the faith, and so forth, before  
“ \_\_\_\_\_ and \_\_\_\_\_ Esquires, and others,  
“ Justices of our Sovereign Lord the King,  
“ assigned to keep the Peace in the said  
“ County; and also to hear and determine di-  
“ vers felonies, trespasses, and other misdemean-  
“ ours in the said County committed, and of  
“ the *quorum*, and so forth.”

## CHAPTER II.

THE DUTY OF ATTENDANCE UPON THE  
SESSIONS.

*Herein of the Custos Rotulorum, Justices, Sheriff, Clerk of the Peace, Coroner, Gaolers, Constables, Jurors, Suitors, Pleaders, &c. with their, and every of their, Duties, Oaths, Fees, Privileges, Indemnities, &c.*

**Custos Rotulorum.** THE CUSTOS ROTULORUM is the principal personage in the Constitution of the Sessions of the Peace.

He is the first *civil* officer in the County, as the Lord Lieutenant is the highest military one : Of late years, indeed, it has been usual for the same person to hold both offices, but they are entirely distinct in their appointments and duties.\* He has, as his title implies, the custody of the Rolls, or records of the Sessions of the Peace, and of the Commission of the Peace. He is nominated by the King under his sign manual, selected, as Lambard informs us, “either for *wisdom, countenance, or credit.*”† He is always himself a Justice of the Peace

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\* 4. Black. Comp. 272.

† Lamb. b. 4. c. 3.

## CUSTOS ROTULORUM.

and *Quorum*, in the County wherein he has his office ; but he has nevertheless been generally considered rather in the light of a minister, than a Judge, on account of the special charge in the commission—" *Quod ad dies, et loca predicta, brevia, præcepta, processus, et indicamenta predicta coram te, et dictis sociis tuis venire facias.*"

No person shall be appointed to the office of *custos rotulorum* within any shire, but such as shall have a bill signed with the King's hand for the same ; which shall be a warrant to the Lord Chancellor to make a Commission, assigning the same person to be *Custos Rotulorum*, until the King hath by another bill appointed one other person to have the office ; and the *Custos Rotulorum* shall exercise the office by himself, or his deputy, learned in the laws, according to the tenor of their commission—\*

How appointed.

But the Archbishop of York, the Bishop of Durham, the Bishop of Ely, and all to whom the King or his progenitors, by letters patent, have granted any liberty to make any of the said officers *Custos Rotulorum*, shall enjoy the same liberty.†

The *Custos Rotulorum*, by virtue of his place, having the custody of the rolls of Sessions, ought to attend the Sessions by him-

To attend the Sessions.

\* 37. Hen. 8. c. 1.—1. Wm. & Ma. Stat. 1. c. 21.

† 37. Hen. 8. c. 1.

self, or his Deputy, who is the Clerk of the Peace.\*

He is directed by Statute "to appoint a sufficient person *residing within the County*, to execute the office of Clerk of the Peace, by himself or sufficient Deputy, such Deputy *being admitted by the Custos Rotulorum*, so often as the office of Clerk of the Peace shall be vacant.†

But he shall not sell the said place, directly or indirectly, under the penalty of losing his said place of *Custos Rotulorum*, and forfeiting double the value of what he shall have taken for the same, to be recovered by him that will sue, to his own use, in any of the Courts of Westminster."‡

**The Justices.** THE JUSTICES, by whom the Session is to be holden, are, of course, the next persons, after the Custos Rotulorum, to be noticed.

**How many necessary to compose a Session.** It requires at least two Justices to compose a Session, whereof one must be of the *Quorum*. This appears from the very words of their Commission, which are, so far as they relate to the present subject of consideration, as follows. "We have also assigned you, and *every two, or more*, of you, of whom any *one (Quorum unus)* of you the said A. B. C. D. &c. we will shall be one, our Jus-

\* Cro. Cir. Com. 34.

† 37. Hen. 8. c. 1.

‡ Wm. & Ma. St. 1. c. 21.

“ tices to enquire the truth more fully, by the  
“ oath of good and lawful men of the afore-  
“ said County, by whom the truth of the  
“ matter shall be better known, of all and  
“ all manner of felonies, poisonings, enchant-  
“ ments, sorceries, trespasses, forestallings,  
“ regratings, engrossings, and extortions,  
“ whatsoever; and of all, and singular, other  
“ crimes and offences of which the Justices  
“ of our Peace may or ought lawfully to en-  
“ quire, &c. &c.—And to hear and determine  
“ all, and singular, the felonies, poisonings,  
“ &c. &c. aforesaid, &c. &c. according to the  
“ laws and statutes of England, &c.—And the  
“ same offenders, and every of them for their  
“ offences, by fines, ransoms, amerciaments,  
“ forfeitures, and other means, as according  
“ to the law and custom of England, or form  
“ of the ordinances and statutes aforesaid, it  
“ has been accustomed, or ought to be done,  
“ to chastise and punish.

“ And therefore we command you and every  
“ of you, that to keeping the peace, ordinan-  
“ ces, statutes, and all and singular other the  
“ premises, you diligently apply yourselves;—  
“ and that at certain days and places, which  
“ you, or any *such two or more* of you as  
“ aforesaid, shall appoint for these purposes,  
“ into the premises ye make enquiries; and  
“ all and singular the premises hear and de-  
“ termine, and perform and fulfil them in the

“ aforesaid form, doing therein what to justice  
 “ appertains, according to the law and custom  
 “ of England: Saving to us the amerciaments  
 “ and other things to us therefrom belonging.

“ And we command by the tenor of these  
 “ presents our Sheriff of M. that at certain  
 “ days and places, which you, or any such two  
 “ or more of you, as aforesaid, shall make  
 “ known to him, he cause to come before you,  
 “ or such two or more of you, as aforesaid,  
 “ so many and such good and lawful men of  
 “ his Bailiwick, (as well within liberties as  
 “ without) by whom the truth of the matter in  
 “ the premises shall be the better known and  
 “ inquired into.”

Such then is the foundation of the authority  
 by which any two Justices of a County, Divi-  
 sion, Riding, or Liberty, one being of the  
*quorum*, may hold a Session of the Peace.

*Justices of the Quorum.* Formerly it was customary to appoint only a select number of Justices, eminent for their skill and discretion, to be of the *quorum*; but now the practice is to advance almost all of them to that dignity, naming them all over again in the *quorum* clause, except perhaps only some one inconsiderable person for the sake of propriety.\*

Indeed the advancement of learning in mo-  
 dern times, made any distinction of this kind  
 unnecessary, long before it was removed in any

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\* Black. Com. 351.

instance by legislative provision, or even by the extension just noticed in the Commissions.

The first statute which recognized this alteration, was in the 26th of Geo. 2.\* which enacted that no act, order, adjudication, warrant, indenture of apprenticeship, or other instrument, done or executed by two or more Justices, which doth not express that one or more of them is of the *quorum* (although the Statutes respectively require that one of the Justices shall be of the *quorum*) shall be impeached, set aside, or vacated for that defect only.

And by a subsequent statute.† In cities, boroughs, towns corporate, franchises, and liberties, which have only one Justice of the *quorum*, all acts, orders, adjudications, warrants, indentures of apprenticeship, or other instruments, done or executed by two or more Justices, qualified to act therein, shall be valid, although neither of the said Justices shall be of the *quorum*.

It may therefore now be fairly admitted, that *any two, or more, of the persons named in the Commission of the peace for any County, Division, Riding, or Liberty, are competent to hold a Session for the same, respectively, having complied with the requisite forms prescribed by divers statutes, all of which are directed to secure three objects; viz, that the*

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\* 26. Geo. 2. c. 27.

† 7. Geo. 3. c. 21.

persons executing an office of so much trust and responsibility, shall be in such situations of life, as to offer a reasonable presumption that they will be above corruption; secondly, that they shall be loyal subjects of that Government, the peace of which they are appointed to protect; and, thirdly, that they shall be conformists to the religion of the State.

**Qualifications.** The specific qualities, by which they are particularly pointed out, are that "they shall be of the most sufficient Knights, Esquires, and Gentlemen of the Law.\* And they must be resident within the Counties for which they act.† And must be possessed of in law or equity, for their own use in possession, a freehold, copyhold, or customary estate, for life, or for some greater estate, or an estate for some long term of years, determinable, upon one or more lives, or for a certain term originally created for twenty one years or more, in lands, tenements, or hereditaments, in England or Wales, of the clear yearly value of £100, above what will discharge all incumbrances affecting the same, and all rents and charges payable out

\* 13. Ric. 2. 7.

† Hen. 5. St. 1. c. 4, but now by 28. Geo: 3. c. 49. any Justice acting as such for any two or more Counties, being adjoining Counties, may act in all matters and things whatsoever, concerning, or relating to, any or either of the said Counties, provided he be resident in one of them.

of the same; or, be entitled to the immediate reversion of remainder of lands leased for one, two, or three lives, or for any term of years determinable on the death of one, two, or three lives, upon reserved rents of the clear yearly value of £300.\*

And to secure the particular object intended by these provisions, no peron shall be capable of acting as a Justice of the Peace, who shall not, before he acts, at some general or quarter Session for the County, or Division, &c. for which he intends to act, take and subscribe the following oath.

" I, A. B. do swear that I truely and *bona fide* have such an estate in law or equity, to <sup>Oath of qualification</sup> " and for my own use and benefit, consisting " of (*specifying the nature of such estate,* " *whether messuage, land, rent, tithe, office,* " *benefice, or what else*) as doth qualify me to " act as a Justice of the Peace for the County, " Riding, or Division of —— according to " the true intent and meaning of an Act of " Parliament made in the eighteenth year of " the reign of his Majesty, King George the " Second, entitled, 'an act to amend and ren- " der more effectual an act passed in the fifth " year of his said Majesty's reign,' entitled an " act 'for the further qualifications of Justices " of the Peace,' and that the same (*except where*

"it consists of an office, benefice, or ecclesiastical preferment, which it shall be sufficient to  
 "ascertain by their known and usual names.)  
 "is lying, or being, or issuing out of land,  
 "tenements, or hereditaments, being within  
 "the parish, township, or precinct of ——,  
 "(or in the several parishes, townships, or pre-  
 "cincts of —— and ——) in the County of  
 "—, (or in the several Counties of ——  
 "and ——);” (as the case may be.)

Oath to be recorded. This oath so taken, and subscribed, is to be kept among the records of the Sessions, by the Clerk of the Peace, who is to deliver an attested copy of it to any person requiring the same, on paying two shillings for it, and such attested Copy will be evidence on any issue in any suit brought under the Statute which requires the qualification.\*  
 Attested Copy evidence.

Penalty. Any person who shall act as a justice without having taken and subscribed the above oath respecting his qualification, or without being actually qualified according to the declaration contained in it, is liable to a forfeiture of £100, one moiety to the poor of the parish in which he most usually resides, and the other moiety to whoever will sue for the same in any of the Courts of Westminster, within six months after the commission of the offence.†

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\* Id.

† Id.

The proof of the qualification is to lie on the defendant, and he cannot avail himself of any lands, &c, not contained in such oath, unless he deliver a notice of his intention to insist on such lands, &c, to the Plaintiff or his Attorney, in writing, at or before the time of pleading, specifying such lands, and the parish and county where situated, except offices and benefices, as before excepted in the oath itself.)\*

Where the lands contained in the said oath or notice, are together with other lands liable to any charges, rents, or incumbrances, for the purposes of this act, such lands are deemed chargeable only so far as the other lands are not sufficient to pay. And where the qualification or any part thereof consists of rent, it is sufficient to specify in such oath or notice, so much of the lands out of which such rent is issuing, as are of sufficient value to answer such rent.†

After such notice, the Plaintiff is allowed, if he think fit, to discontinue his action on payment of costs, with leave of the Court; but if he discontinue otherwise, or be nonsuit, or have a verdict against him, the Defendant will be entitled to treble costs.‡

These provisions, however, respecting pe-

\* Id.

† Id.

‡ Id.

lunary qualification, only extend to what are usually denominated “*County Justices* ;” that is, to the description of persons, of whose pretensions Government is supposed to know nothing but from the situation they fill in society, in regard to *property only*. For they do not extend to persons who, from the offices they hold, or the rank in society which they fill, are supposed to be previously and eminently qualified in some way or other for the important trust.

**Exceptions.** Thus, they do not extend to any city, town, cinque-port, or liberty, having Justices of Peace within their limits.

Nor to any peer or lord of parliament, or to the lords of the privy council, justices of either bench, barons of the Exchequer, attorney or solicitor-general, the justices of the great sessions of Chester and Wales, or to the eldest son, or heir apparent, of any peer or lord of parliament, or of any person qualified to serve as a knight of a shire. Nor to the officers of the board of Green-cloth, or the commissioners, and principal officers of the navy, or the two under secretaries of state, or the secretary of Chelsea College, where they usually have been Justices. Nor to the heads of colleges, or halls, or the vice chancellors, or to the mayors, of Oxford and Cambridge, but that *they* may respectively be Justices in the Counties of Oxford, Berks, and

Cambridge, and the cities and towns within the same.\*

Having dismissed the subject of pecuniary qualification, the next thing to observe, is, that the Person, who intends to act as a Justice, must sue out a writ from the Chancery, called, from the first words of it, a Writ of *Dedimus potestatem*, to enable him to take "the oath of office," before some other acting Justice or *Dedimus* Justices, to be certified into the Court, from *potestatem*, which it issues, within a time specified, by the Clerk of the Peace.

*The form of the oath is at this day as follows.*

" Ye shall swear that as Justice of the Peace  
 " in the county of M, in all articles in the <sup>Oath of of-</sup>  
 " king's commission to you directed, you shall  
 " do equal right to the poor and to the rich,  
 " after your cunning, wit, and power, and after  
 " the laws and customs of the realm, and sta-  
 " tutes thereof made : And ye shall not be of  
 " counsel of any quarrel hanging before you :  
 " And that ye hold your sessions after the form  
 " of the statutes thereof made : And the issues,  
 " fines, and amerciaments that shall happen  
 " to be made, and all forfeitures that shall fall  
 " before you, ye shall cause to be entered with-  
 " out any concealment (or embezzling) and  
 " truly send them to the king's exchequer.  
 " Ye shall not let for gift or other cause, but  
 " well and truly ye shall do your office of jus-

“ tice of the peace in that behalf: And that you  
 “ take nothing for your office of justice of the  
 “ peace to be done, but of the king, and fees  
 “ accustomed, and costs limited by the statute,  
 “ And ye shall not direct, nor cause to be di-  
 “ rected, any warrant (by you to be made) to  
 “ the parties, but you shall direct them to the  
 “ bailiff of the said county, or other the king's  
 “ officers or ministers, or other indifferent per-  
 “ sons, to do execution thereof.

“ So help you God.”

Having thus secured, so far as the possession of property, and the verification of that property can be supposed to do it, the respectable-ness of the justice; and moreover, his incor-ruptableness, so far as the obligation of an en-gagement by oath can secure it; the Legisla-ture has next adverted to a security for his loy-alty and his conformity, by requiring that,

*Oaths of Allegiance, &c.* every Justice shall, within six calendar months, take the oaths of allegiance and supremacy, and abjuration, and make and subscribe the decla-ration against transubstantiation in one of the Courts of Westminster, or at the General, or Quarter Sessions of the Peace where he shall be or reside, as other persons qualifying for officers,\* which oaths and declarations are as follow.

\* 1. Geo. 1. St. 2. c. 13.—2. Geo. 2. c. 31.—9. Geo. 2. c. 26.—25. Car. 2. c. 2.—6. Geo. 3. c. 53.

The oath of allegiance is common to all Governments, and

*The Oath of Allegiance, by 1 Geo. St. 2, c. 13.*

“ I, A. B. do sincerely promise and swear, Of Allegiance.  
“ that I will be faithful and bear true allegiance  
“ to his Majesty, King George. So help me  
“ God.”

*The Oath of Supremacy, by 1 Geo. St. 2, c. 13.*

“ I, A. B. do swear, that I do from my heart Of Supre-  
“ abhor, detest, and abjure, as impious and macy.  
“ heretical, that damnable doctrine and po-  
“ sition, that princes excommunicated, or de-  
“ prived by the authority of the See of Rome,  
“ may be deposed or murdered by their sub-  
“ jects, or any other whatsoever. And I do de-  
“ clare, that no foreign prince, person, prelate,  
“ state, or potentate, hath, or ought to have,  
“ any jurisdiction, power, superiority, pre-  
“ eminence, or authority, ecclesiastical, or  
“ spiritual, within this realm. So help me  
“ God.”

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varies but little, in any of them, being merely an obligation to defend the existing State. In England, anciently, every male above twelve years of age was obliged to take this oath in the Torn or Leet, and it was a high contempt to refuse it. The oath of supremacy was the necessary consequence of abolishing the papal authority at the Reformation: The oath of abjuration was imposed at the Revolution, in order to exclude the Stuart family from pretending to the throne. It has received several alterations, but now stands determined by the 6th of Geo. 3.

*The Oath of Abjuration, by 6 Geo 3, c. 53.*

Of Abjura-  
tion.

“ I, A. B. do truly and sincerely acknow-  
“ ledge, profess, testify, and declare, in my  
“ conscience before God and the world, that  
“ our Sovereign Lord, King George, is lawful  
“ and rightful King of this realm, and all  
“ other, his Majesty’s dominions, thereto be-  
“ longing. And I do solemnly and sincerely  
“ declare, that I do believe in my conscience,  
“ that not any of the descendants of the person  
“ who pretended to be Prince of Wales, during  
“ the life of the late King James the Second,  
“ and since his decease pretended to be, and  
“ took upon himself the style and title of, King  
“ of England, by the name of James the Third,  
“ or of Scotland, by the name of James the  
“ Eighth, or the style and title of King of  
“ Great Britain, hath any right or title what-  
“ soever to the crown of this realm, or any  
“ other the dominions thereunto belonging.  
“ And I do renounce, refuse, and abjure, any  
“ allegiance or obedience to any of them. And  
“ I do swear that I will bear faith and true al-  
“ legiance to his Majesty, King George, and ■  
“ him will defend to the utmost of my power  
“ against all traitorous conspiracies and at-  
“ tempts whatsoever, which shall be made  
“ against his person, crown, or dignity. And ■  
“ will do my utmost endeavours to disclose and ■  
“ make known to his Majesty and his succes-

“ sors, all treasons and traiterous conspiracies  
 “ which I shall know to be against him, or any  
 “ of them.

“ And I do faithfully promise, to the utmost  
 “ of my power, to support, maintain, and de-  
 “ fend, the succession of the Crown against  
 “ the descendants of the said James, and  
 “ against all other persons whatsoever, which  
 “ succession, by an act entitled, ‘ An act for  
 “ the further limitation of the Crown, and  
 “ better securing the rights and liberties of the  
 “ subject,’ is, and stands limited, to the Princess  
 “ Sophia, Electress, and Dutchess Dowager  
 “ of Hanover, and the heirs of her body being  
 “ Protestants. And all these things I do plainly  
 “ and sincerely acknowledge and swear, ac-  
 “ cording to the express words by me spoken,  
 “ and according to the plain and common  
 “ sense and understanding of the same words  
 “ without any equivocation, mental evasion,  
 “ or secret reservation whatever.

“ And I do make this recognition, acknow-  
 “ ledgement, abjuration, renunciation and pro-  
 “ mise, heartily, willingly, and truly, upon the  
 “ true faith of a christian.

“ So help me God.”

*The Declaration against Transubstantiation,*

by 25. Car. 2. c. 2. Declaration  
 “ I, A. B. do declare, that I do believe that against  
 “ there is not any transubstantiation in the transubstan-  
 tiation.

" sacrament of the Lord's Supper, or in the  
 " elements of bread and wine, at, or after,  
 " the consecration thereof by any person  
 " whatever."

To be registered. This declaration is to be subscribed by the Justice qualifying, at the same time that he takes the oaths, and the like register is to be kept of it.\*

Receiving the Sacra-  
 ment. The last test, which is imposed on the Justice qualifying, respects also his conformity, and requires that, within six months after admission into, or receiving of, his office, he shall receive the sacrament of the Lord's Supper, according to the usage of the Church of England in some public church, upon some Lord's day, immediately after divine service and sermon; a certificate of which under the hands of the Minister and Church wardens, he shall first deliver to the Court where he takes the oaths, and make proof of the truth thereof by two witnesses on oath, all of which must also be put on record. And every such person that shall neglect to take the oaths or the sacrament, as aforesaid, and after such neglect shall execute his office, and being thereupon convicted, upon information, presentment, or indictment, in any of the king's courts at Westminster, or at the assizes, such person shall be disabled to sue any action or information in course of law, or to prosecute

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\* 25. Car. 2. c. 2.

any suit in equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office, or to vote at any election for members of parliament, and shall forfeit £500. to be recovered by him that shall sue for the same in any of his Majesty's courts at Westminster\*.

*Form of the Certificate.*

“ We the minister and church-wardens of the  
 “ parish of \_\_\_\_\_ in the county of \_\_\_\_\_, Certificate,  
 “ do hereby certify, that on Sunday the \_\_\_\_\_  
 “ day of \_\_\_\_\_ in the year of our Lord \_\_\_\_\_  
 “ in the parish church of \_\_\_\_\_ aforesaid, im-  
 “ mediately after divine service and sermon,  
 “ C. L. of \_\_\_\_\_ in the county of \_\_\_\_\_, esquire, did  
 “ receive the sacrament of the Lord's Supper,  
 “ according to the usage of the church of Eng-  
 “ land. Witness our hands the day and year  
 “ above written.”

M. M. Minister.

A. O. } Church-Wardens.  
 B. O. }

It is to be observed, however that an act of  
 occasionally passes, whereby persons, who have  
 omitted to qualify themselves in due time, are  
 indemnified, provided they qualify themselves  
 within a time in such act limited, and provided  
 judgment hath not been given against them  
 for the penalty incurred by their neglect.

\* 1. Geo. 1. St. 2. c. 13.—2. Geo. 2. c. 31.—9. Geo. 2. c.  
 26.—16. Geo. 2. c. 30.

Not to qualify a second time. *But no Justice is obliged to take and subscribe the oaths more than once in one king's reign,*

For it is enacted by statute, "that all persons who have been or shall be appointed Justices by any commission granted by his present Majesty, and have taken, or who shall take THE OATHS OF OFFICE of a Justice of the Peace before the Clerk of the Peace or his deputy, and who shall have taken and subscribed, or shall take and subscribe at some Session THE OATH required by 18 Geo. 2, c. 20, and all persons who shall be appointed Justices by any commission which shall be granted after his Majesty's demise by any of his successors, and shall have after the issuing the first commission whereby such persons shall be appointed Justices in the reign of any succeeding King, taken and subscribed the said oaths—shall not be obliged during the reign of his present Majesty, or during any future reign, in which such oaths shall have been so taken and subscribed as aforesaid, to take and subscribe the same oaths by reason of such persons being again appointed Justices by any subsequent commission granted during any such reign."\*

**Prohibition.** Having noticed the qualifications and observances necessary to enable persons to act as Justices of the Peace, it only remains also to notice the prohibitions against particular persons from acting in that capacity.

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\* 7. Geo. 3. c. 9.

Sheriffs cannot act as Justices during the Sheriff, continuance of their Shrievalty.\*

Nor can the Coroner, in the County for Coroner, which he is elected such, according to the better opinions. The same reason operates in both instances, viz. that a man shall not be both a Judge, and an officer of the court, at the same time; but there is no special statute to prohibit the last mentioned officer.†

Also no "Attorney, Solicitor, or Proctor, Attorneys while he acts in that capacity, shall be a Jus-<sup>Solicitors,</sup> and Proctors tice of Peace for any County." But this does not extend to Justices by charter.‡

The death, or abdication of the King, puts Death &c. of an end to the authority of all the Justices King. named by him in the commission; but by special statutes they are enabled to act for six months after, unless sooner prohibited by the Successor.§

Which of course is done by a new commis-<sup>New com-</sup> sions; for every new commission supersedes <sup>mission.</sup> the former.||

But these rules do not apply to Justices by charter, not by commission.

Any Justice may also be discharged from the Discharge commission by writ under the great seal. <sup>under great seal.</sup>

\* 1. Mar. Ess. 2. c. 8.

† Dalt. c. 3.

‡ 5. Geo. 2. c. 18.

§ 1. Ann. St. 1. c. 8.

|| 1. Black. Com. 353.

“Formerly,” says Blackstone, “it was thought that if a man were named in any commission of the peace, and had afterwards a new dignity conferred upon him, that this determined his office; he no longer answering the description of the commission.”\*

Promotion  
no dis-  
charge.

But now by statute, “altho’ any Justice of Peace be made duke, archbishop, marquis, earl, viscount, baron, bishop, knight, justice of one bench or the other, or serjeant at law, yet he shall remain justice, and have authority to execute the same.”†

Justices not  
to be amerced  
by Sessions  
for non at-  
tendance.

The Court of Session has no authority to amerce any Justice of the Peace for non-attendance, as the Justices of Assize *may* for the absence of any such Justices at the Gaol Delivery; for it is a general rule that *inter pares non est potestas*; it being reasonable rather to refer the punishment of persons in a judicial office, in relation to their behaviour in such office, to other Judges of a superior station, than to those of the same rank with themselves.‡

If a mayor or other officer under a charter, without whose presence the Session cannot be holden, voluntarily absent himself without sufficient cause, it is a misdemeanor, for which he may be punished by the Court of King’s Bench on information.§

\* 1. Black. Com. 353.

† 1. Ed. 6. c. 7.

‡ 2. Hawk. &c. § 1. Strange. 21.

## JUSTICES.

"Justices shall have for their wages 4s. the Wages for day, for their time of attendance in Session, and their clerk† 2s. of the fines and amerciaments rising and coming of the said Sessions, by the hands of the Sheriffs; and the Lords of Franchises shall be contributory to the said wages, after the rate of their part of the fines and amerciaments.‡

And the escheats of the Justices shall be doubled, and the one part delivered by them to the Sheriff, to levy the money thereon arising, and thereof to pay the Justices their wages by the hand of the Sheriff, by indenture betwixt them, thereof to be made. But no Duke, Earl, Baron, or Banneret, shall take any wages."§

Although Justices, as we have seen, are prohibited from taking any thing for the execution of their office, except "of the King, Clerk's fees and fees accustomed, and costs limited by statute," their respective clerks are entitled to certain fees to be settled in Sessions from time to time, and approved and confirmed by the Judges of Assize at the next Assizes for the county.\* "But such table of fees shall be of no authority till it have received the confirmation of the said Judges of Assize; and if

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† Meaning their *public* Clerk, or Clerk of the Peace.

‡ 12 Ric. 2. c. 10.

§ 14. Ric. 2. c. 11.

\* 26. Geo. 2. c. 14.

any such clerk, at any time after three months from such table of fees being ratified, shall take more on account of business done by the Justice to whom he is such clerk, he shall forfeit £20, to whoever shall sue for the same, within three months, in the Courts of Westminster."†

**In Middlesex** In Middlesex the table of fees are to be confirmed by the three Chiefs of the Courts of Law at Westminster. And in all places this table of fees, when ratified, is to be placed in the hands of the Clerk of the Peace, and by him hung up in a conspicuous part of the room where the Quarter-Sessions are holden, under a penalty of £10, to be recovered in like manner.‡

As these fees due to the Clerks of Justices for the manual labour supposed to be performed by them, in taking informations, drawing warrants, &c. under the direction of their respective principals, are confined to the office of a magistrate *out of Session*, except the last noticed point; viz. the publication of them; sufficient has been said on the subject here, where the object of the author is to confine himself as much as possible to the business of sessions.

**Fines, forfeitures, and penalties.** Those monies under the denomination of forfeitures, and fines, forfeitures, and penalties, which Justices

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† Ibid.      ‡ Ibid.

JUSTICES.

are authorized by various statutes to receive on account of the King, or any other persons, *out of Sessions*, are directed, by a recent act of Parliament,\* to be paid annually, before the Michaelmas Session, to the sheriff of the county; and a duplicate of the account of such fines, forfeitures, and penalties to be sent to the clerk of the peace for the said county, or town clerk (*as the case may be*) previous also to the said Michaelmas Session; but as these provisions relate also, so far at least as respects the Justices, to their duties *out of Sessions*, for the reasons before stated, it is sufficient to refer to the Stat. itself.

The last matter to be noticed relative to the <sup>Indemnities of Justices.</sup> Justices, is their indemnities in the execution of their office.

“A Justice of the Peace is under the peculiar protection of the law: for he is not punishable at the suit of the party, but only at the suit of the King, for what he doth as Judge in matters which he hath power by law to hear and determine.”†

This, as a general position, is not less correct, than it is reasonable; but it is, like all general rules, subject to some exceptions, as where the erroneous conduct of the Justice is obviously malicious, and injurious.‡

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\* 41. Geo. 3. c. 85.

† 2. Haw. c. 13.

‡ 1. Bur. R. 556.

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Two-fold by His indemnity, however, in the execution of his office, necessarily resolves itself into two divisions *here*; viz. 1st. in the capacity of an individual magistrate; and, 2ndly, as a member of the Court of Quarter Session. Of the latter only, it is the professed purpose to treat in this book, and therefore on what concerns him as an individual magistrate acting *out of Sessions*, little shall suffice.

It may fairly be laid down, then, as a general position, that unless it clearly appear that the justice hath been partially, maliciously, or corruptly, influenced in the exercise of his authority, and hath consequently abused the trust reposed in him, the court above will not grant an information.

Justices not punishable for errors in judgment. For the rule is invariable, that the court will never interpose to punish a Justice of the judgment. Peace for a mere error in judgment.\*

By information. And even where a justice acts illegally, yet if he has acted honestly and candidly, without oppression, malice, revenge, or any bad view or ill intention whatsoever, the court will never punish him by the extraordinary course of an information; but leave the party complaining to their ordinary remedy or method of prosecution, by action or by indictment.†

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\* 1. Bur. R. 556.—1 Term. R. 653, 692.

† 2. Bur. R. 1162.

And it seems that the justice is not liable to be punished both criminally and civilly ; for <sup>Not by both</sup> before the court will grant an information, they will require the party to relinquish his civil action, if any such has been commenced : and even in the case of an indictment, and although the indictment be actually found, yet the attorney-general (on application made to him) will grant a *noli prosequi* upon such indictment, if it appear to him that the prosecutor is determined to carry on a civil action at the same time.\*

And it is further provided by statute, " that <sup>Must have</sup> no writ shall be sued out against, nor any copy <sup>Notice.</sup> of any process at the suit of a subject shall be served on, any justice of the peace, for any thing by him done in the execution of his office, until notice in writing of such intended writ or process be delivered to him, or left at the usual place of his abode, by the attorney for the party who intends to sue, at least one calendar month before the suing out, or serving the same ; in which notice shall be clearly and explicitly contained the cause of action, on the back of which notice shall be indorsed, the name of such attorney, and the place of his abode, who shall be entitled to the fee of 20s. for preparing and serving such notice.

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thereof upon a civil suit, &c.\* and for all these and similar offences against decency and good manners, as has been observed, the Justices in Session may instantly order the offender to be apprehended and imprisoned at their discretion.†

Contempt out of Court. But they cannot, as the superior Courts do, award an attachment for contempts of their orders committed *out of Court*, but must have recourse to bill of indictment; which, being found, authorizes them to issue a warrant to apprehend the offender, to be dealt with as for any other misdemeanor.‡

Indictment in consequence thereof. It is also broadly laid down by many authorities, that Justices are not punishable for what they say, or do, in Sessions, unless there be manifest oppression, or wilful abuse of power.§ It has even been said that a Justice is not punishable by indictment for words addressed to jurors, in his judicial capacity, however gross they may be; as where a Justice, in the General Session of the Peace, said to the grand jury, "You have not done your duty, you have disobeyed my commands; you are a seditious, scandalous, corrupt, and perjured jury;" for Lord Mansfield, on a motion to quash an *indictment* against a Justice of the Peace for

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\* 2 Hawk. c. 1.

† Staunf. P. C. 73.

‡ 2 Sess. Ca. 176.

§ Staunf. P. C. 173. —2 Barnardist 249.

JUSTICES.

using such words, is reported to have said as follows: "A judge of a court of record cannot be put to answer civilly, or criminally, for words spoken in office."

And upon a motion for an information against four Justices for refusing to amend a poor rate, under circumstances of even *strong suspicion* of improper motives, the same Chief Justice took occasion to say, "it must be a very strong case indeed, with *very flagrant proofs* of corruption, in which the court would grant an information against judges acting in a court of record with powers entrusted to them by the constitution.\*

THE SHERIFF OF THE COUNTY is the next <sup>The Sheriff.</sup> officer of the session who claims notice. He was by the common law a principal conservator of the peace; and may, *ex-officio*, award process of the peace, and take surety for it; and it is said that the security so taken is a recognizance, and matter of record.† But, as has been previously observed, he cannot, during his shrievalty, act in the capacity of a justice of the peace. And he has no authority to take a *bond* for the appearance of persons *arrested* by him, under process issuing upon an indictment at the sessions for a misdemeanor, but

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\* 1 Black. Rep. 432.

† 2 Hawk. c. 8.

must take a recognizance for their appearance.\*

How appointed.

At the common law this officer was chosen by the county, as the coroner is at this day; but he is now appointed "at the Exchequer by the Chancellor, Treasurer, and Chief Baron, taking to them the Chief Justices."†

Must attend the Sessions.

It is the duty of the Sheriff, either in person or by deputy, to attend the Sessions of the Peace, there to return his precepts, to receive fines for the king, and to take charge of the prisoners.‡ For the county gaol is under the direction of the Sheriff by statute.§ Insomuch, that if the gaoler, who is merely his servant, suffer a felon to escape, the Sheriff may be indicted, fined, and imprisoned.||

Punishable by Sessions.

He is also punishable by the Justices in Session for any default in executing their writs and precepts; for being an officer of that court, he is of course amenable to it.\*\*

But if he have a warrant from a Justice of the Peace to execute, he is not obliged to do it in person, but may authorize another to execute it, but he is nevertheless answerable for its being regularly done.¶

\* 4 T. Rep. 505.

† 14 Ed. 3. c. 7.

‡ 2 Hawk. c. 8.

§ 14 Ed. 3. c. 10.—And 19. Hen. 7. c. 10.

|| 1 Hale's Hist. 597.

\*\* 2 Hawk. c. 22.

¶ 2 Hawk. c. 13.

SHERIFF.

And he cannot excuse himself from executing any precept because of resistance, for he is authorized by statute to take the power of the county in aid of him.\*

He has the appointment of the gaoler upon a vacancy, of the under-Sheriff, and of the bailiffs. But he cannot dispose of any of these offices for money, for "none shall buy, sell, let, or take the office of under-sheriff, gaoler, bailiff, or other office pertaining to the office of High Sheriff, on pain of £500, half to the king, and half to him that shall sue within two years.†

"And the sheriff shall not return any of his officers upon the inquest, on pain of £40, half to the king, and half to him that shall sue in the sessions, or else where."‡

When a Sheriff goes out of office, the custody of the county gaol is immediately vested in his successor, who of course becomes responsible; and all writs and processes, remaining unexecuted at the expiration of his shrievalty, he is directed by statute to turn over to his successor by indenture and schedule, who is compellable to execute and return the same.§

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\* 13 Edw. 1. St. 1. c. 30.

† 3 Geo. c. 15.

‡ 23 Hen. 6. c. 10.

§ 20 Geo. 2. c. 37.

Clerk of the **THE CLERK OF THE PEACE** is an essential peace, and constituent part of every Session of the Peace. He is appointed by the Custos Rotulorum of the County, but amenable to the Justices in Session for the execution of his duties, which are various and important. Primarily, they consist in issuing the processes, and recording the proceedings of the Court ; but there are various others imposed on him, as well by custom and the necessity of the thing, as by many positive statutes.

Under commissions by charter, such as in cities and corporate towns, the person who fills an analogous office, and whose duties are mostly similar, has usually some other title than that of "Clerk of the Peace," generally that of "Town Clerk;" and his appointment is usually in the disposal of the Body Corporate whose officer he is, and not in that of the Custos Rotulorum of the County.

**To be a sufficient person, and to may appoint a deputy.** It is directed by statute, that the Clerk of the Peace be an able and sufficient person resident in the county ; but he may appoint a deputy with the like qualities, but to be approved and allowed by the Custos Rotulorum.\*

**May not purchase his office.** We have seen that the Custos Rotulorum is forbidden to sell the office ; and by the same authority the Clerk of the Peace is prohibited from purchasing it, under like penalties ; viz.

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\* 37. Hen. 8. c. 1.

CLERK OF THE PEACE.

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“that if he shall give any reward, fee, or profit directly, or indirectly, or any bond or other assurance to him or to any other person, for such appointment, he shall be disabled from holding the office, and shall moreover forfeit double the value of the thing given for the appointment, to whomsoever shall sue for the same in any of the Courts of Westminster.”\*

*The Form of the Appointment.*

Appoint-  
ment.

“Whereas the Office of the Clerk of the  
“Peace for—— is now vacant, by the death of  
“——, esq. late Clerk of the Peace for the  
“said county, NOW KNOW ALL MEN by these  
“presents, that the Right Hon. Thomas Earl  
“of——, Custos Rotulorum of the said  
“County of——, hath nominated, consti-  
“tuted, and appointed, and by these presents  
“doth nominate, constitute, and appoint  
“O. B. esq. a person skilful in the laws of  
“England, and now inhabiting and residing  
“within the same county, to be Clerk of the  
“Peace of the said county, to have, hold,  
“execute, and enjoy the office of Clerk of  
“the Peace of the county aforesaid, by him-  
“self or his sufficient deputy; and by him-  
“self or such deputy to have, receive, and  
“take to the use of him the said O. B. all  
“fees, wages, perquisites, advanfages, emo-

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\* 1 Wm. & Ma. c. 21.

“ luments, and appurtenances whatsoever to  
 “ the said office belonging, or in any wise ap-  
 “ pertaining, for and during so long a time as  
 “ the said O. B. shall well behave and demean  
 “ himself in the said office ;—in testimony  
 “ whereof, the said Thomas Earl of — hath  
 “ hereunto set his hand and seal, the ——  
 “ day of —, in the —— year of the reign  
 “ of our sovereign lord George the third, now  
 “ king of the united kingdom of Great Bri-  
 “ tain and Ireland, and in the year of our  
 “ Lord —.”

Cannot be  
appointed in  
any other  
manner.

And the Custos cannot appoint him in any other manner than as prescribed by the statute ; for if he does he is no Clerk of the Peace ; as if he appoint him during pleasure, instead of for so long as he shall well demean himself, he does not execute the authority given him by the act, and so his nominee is no Clerk of the Peace.\*

Has an es-  
tate for life  
in the office.

The statute having directed that he shall enjoy his office “so long as he shall well demean himself,” he has of course an estate for life, or freehold, in the office, on the mere condition of behaving well ; therefore if he perform the condition he cannot be dispossessed, nor is his estate forfeited by the death or removal of the Custos.†

\* 12 Mod. Rep. 42.

† 4 Mod. Rep. 167, 173, 293,

“ But if he shall misbehave himself in his office, the Justices of the Peace in their general quarter session, or the major part of them, on <sup>Misbehaving our in his office.</sup> complaint in writing exhibited against him, may upon examination and due proof thereof, openly in the said session suspend or discharge him : and in such case the Custos Rotulorum shall appoint another person to the office ; and in case of refusal or neglect so to appoint before the next general quarter session, the Justices then and there assembled may appoint one.”\*

It is not possible to adduce examples of all the means by which a Clerk of the Peace may be said to be guilty of misbehaviour in his office, so as to forfeit his situation, but extortion has been decided to be one of them, insomuch, that upon proof in a summary way, either at the same, or any other sessions to which the matter may be adjourned, he may be superseded or discharged.†

And the order of Session removing him, need not set out the evidence on which it is founded.‡

And every Clerk of the Peace, before he enters upon his office, shall in open session take the following oath ;§

\* 1. Wm. & Mar. c. 21.

† Mod. Cas. 192.

‡ Strange's Rep. 996

§ 1 Wm. & Mar. c. 21.

**Oath of office.** "I, A. B. do swear, that I have not, nor will, pay any sum or sums of money, or other reward whatsoever, nor have given any bond or other assurance to pay any money, fee, or profit, directly or indirectly, to any person or persons whomsoever, for such nomination or appointment.

"So help me God."

**Other oaths.** He must also take the oaths of allegiance, supremacy, and abjuration, and comply with the usual forms of persons qualifying for offices.

**Not to act as a solicitor.** "No Clerk of the Peace, or his deputy, shall act as solicitor, attorney, or agent, or sue out any process at any general or quarter sessions, where he shall execute the office of Clerk of the Peace or deputy, on pain of 50*l.* to him who shall sue in twelve months with treble costs."\*

**To certify to the sheriff outlawry.** Beside issuing the processes, and recording the proceedings, of the sessions, he is directed by statute "to certify into the King's Bench the names of such as shall be outlawed, attainted, or convicted of felony."†

**To deliver estreats.** "Also to deliver to the Sheriff, within ten days after September 29th, yearly, a perfect estreat or schedule of all fines, and other forfeitures in Sessions."‡

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\* 22. Geo. 2. c. 46.

† 34 & 35 Hen. 8. c. 14.

‡ 22 & 23. Car. 2. c. 22.

He is also obliged to deliver duplicates of these upon oath yearly to the Barons of the Exchequer ; but as this portion of his duties is foreign to the limits of the subject under discussion, we must pass on to others which the practise of the court of Session of the Peace imposes on him. A general view of these is all that can be useful, without enumerating such as are only occasional, or directed by statutes of local interest, as filing the rules of friendly societies, and the lists of insolvent debtors seeking relief from the sessions, registering the recognizances of ale-house-keepers, and other matters of similar kinds.

It is his duty, then, to read the commission, and the King's proclamation—to administer all oaths, whether to persons qualifying for offices, constables, jurors, or witnesses. Divers acts of parliament are directed to be read, and if not neglected, are read by the Clerk of the Peace. He calls upon the parties under recognizance, whether to prosecute, plead, or give evidence. He draws the indictments, arraigns the prisoners, and presents the bills to, and receives them from, the grand jury. He draws copies of traverses, makes out subpœnas and bench warrants, takes recognizances, receives the verdicts, and (where the undignified practice prevails of the chairman not pronouncing the judgment of the court,) he is the organ through which its opinion is given on subjects of muni-

cipal and parochial law, and its sentence on criminal offenders is passed.

Further to enumerate his general duties would be superfluous, as they are partly to be collected from the established table of fees in the Appendix annexed hereto, and the remainder are pointed out by the different statutes which impose them, and which prescribe his remuneration.

**Fees.**

The more ancient fees of the Clerk of the Peace are established by usage, which gives them a sanction equivalent to that of the Legislature. It has therefore been decided that every Clerk of the Peace may legally demand such fees as have been immemorially taken within his county, on such subjects with which no statute has interfered; and that the Justices in Session have no controul over them, so as either to augment, abridge, or remit them: and as they have no power to alter, so they have none to compel payment, but he must recover them by action.\* If they be such fees as are certain and determined, an action of *indebitatus assumpsit*, will lie, and if uncertain *quantum meruit*.

It is said, however, that he is not bound "to enter judgment, or the like" at the suit of any, without having his legal fee for the same; but the distinction is taken, that if the court order any thing, *without the suit of another*, viz. *ex officio*, he is compellable to enter the same without fee.†

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\* 1 Ld. Raym. 703.—12 Mod. Rep. 608. † Cromp. 159.

But if, by colour of his office, he take more Extortion than his due, it will be extortion, and punishable by fine and imprisonment, on indictment *at common law*. It should seem also that he is punishable under the statute 3 Edw. 1. c. 26, which inflicts for the penalty "the yielding twice as much as was received, beside being punished at the King's pleasure;" for though *generally* that statute has been construed to extend only to offices of anterior date, it has been decided to apply to Justices of the Peace taking fees contrary to their oath at their admission into office, though that office was not instituted till long after.\*

Modern statutes having imposed a prodigious addition of business upon Justices in the Courts of Quarter Sessions, their officers have, of course, additional duties to perform, especially the Clerk of the Peace. In most of these instances, however, the particular statute imposing the burthen, apportions also the remuneration. There would be much difficulty, and no utility, result, from a particular enumeration of all these acts. It is sufficient, therefore, in this place to observe, that where a statute has determined his fee, it is equally extortion in him to demand more, as in the case of fees sanctioned by prescriptive usage; and, secondly, that where no particular sum has been prescribed,

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\* Dalt. c. 41.—1 Hawk. 68.

an analogy, by no means difficult to ascertain, may well be resorted to as a guide of his discretion.

The suitors of the court are not only protected against the *corruption* of the Clerk of Peace, by the remedies already pointed out to a certain degree also against his *negligence*, by a particular statute, which enacts that "two shillings shall be paid to him for drawing an indictment of felony; and if it be defective he shall allow a new one gratis, on pain of forfeiting five pounds to him that shall sue."\* side which specific penalty, it is holden that he is amercliable in the Court of King's Bench for gross faults in indictments drawn by him and removable thither.†

**Coroner.**

**THE CORONER.**—The office of Coroner is a very ancient one by the common law. Before the institution of justices, the Coroners were Conservators of the Peace, and persons of authority and dignity; insomuch, that they were eligible to the office under the degree of Knights.‡ Since the appointment of Justices of the peace, much of the authority with which Coroners were invested, is superseded their and transferred to the former. They are ne-

\* 10 & 11 W. 3, c. 23.

† Lilly's Pract. Reg. 71.

‡ 4 Co. Inst. 271.

theless still considered by all writers on the subject, as part of the proper attendants upon the courts of Quarter Sessions ;\* though it may be difficult perhaps to assign a sufficient reason for it now, since the preservation of the peace has ceased to be a part of their office ; for it does not appear that they have any prescribed duty to perform there, except *occasionally*, in the capacity of Suitors, or of Defendants.

Besides his fee of 13*s.* 4*d.* awarded by an ancient statute on every inquisition,† the Coroner is entitled, by a recent provision,‡ to “ 20*s.* more, (*if not taken on a body dying in gaol,*) and also 9*d.* for every mile he shall be compelled to travel from his usual place of abode, for the taking of every such inquisition ; which sum shall be paid *by order on the treasurer, by the justices in sessions,* out of the county rates, for which order, no fee shall be paid ; and for every such inquisition taken on a body dying in *prison*, he shall be paid so much as the *justices in sessions* shall allow, not exceeding 20*s.* to be paid in like manner.”

“ But no Coroner of the king’s household, and of the verge of the king’s palaces, nor any Coroner of the admiralty, nor any Coroner of the county palatine of *Durham*, nor any Coroner

\* *Dalt.* c. 185.—*Cro. Cir. Com.* 34.

† *3 Hen. 7, c. 1.*

‡ *25 Geo. 2, c. 29.*

of the city of *London* and borough of *Southwark*, or of any franchises belonging to the said city; nor any Coroner of any city, borough, town, liberty, or franchise, not contributory to the rates directed by the 12 *Geo. 2.* c. 29, or within which such rates have not been usually assessed, shall be entitled to any fee given by this act: but it shall be lawful for all such Coroners as are last mentioned to receive all such fees and salaries as they were entitled to by law before this act, or as shall be given them by the person by whom they are appointed."

And unless the Coroner has taken an inquisition in due form, he is not entitled to any fees; for on a motion for a *mandamus*, to compel justices to pay to the Coroner the fees and travelling expences due to him, for taking four inquisitions upon four bodies cast by the sea upon the shore; it appeared that the papers, purporting to be inquisitions, *were not inquisitions at all*; as they were signed only by the Coroner and foreman of the jury. The principal question in the case was, whether, when the Coroner finds the body of a person manifestly drowned at sea, upon the shore, he may not take an inquisition on the body? The Court inclined to the opinion that he could not, and it was said to be the usage to bury such bodies without any inquisition being taken; but without expressly determining this,

they said, that the first question which they had to decide, was, whether the Coroner had taken any inquisition at all? if he had not, he was not to be paid for what he had not done; this, therefore was an objection *in limine* to the application, for these enquiries not being signed by all the jurors, were not inquisitions.—*Mandamus* denied.\*

And no Coroner of any liberty or franchise is entitled to any fees under this statute, unless such liberty or franchise be contributory to the county rates; for upon a *mandamus* to justices to make an order for payment of the fees and travelling expences of the Coroner of the *liberty and franchise* of the manner of Pontefract, in respect of certain inquisitions taken by him, THE COURT ordered the writ to be quashed, as it did not state, that the manor of Pontefract was contributory to the county rates, and consequently the justices had no authority by the stat. 25 Geo. 2, c. 29, to make any such order: and Lord Kenyon, Ch. J. observed, that the prosecutor should have alleged in the writ, all those facts which were necessary to shew that he was entitled to the relief prayed, and that he had a right to call on the magistrates to do that, for the non-performance of which he sued out his compulsory writ.†

If the Coroner take any fees beyond what *Extortion*.

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\* Nolan's R. 144.

† 7 Term R. 52,

are thus allowed by the law, he will be guilty of extortion.

What it is. This offence, so far as we are here concerned with it, is defined to be "the taking of money by any officer, by colour of his office, either when none is due, or not so much is due, or where it is not yet due."† Thus a Gaoler obtaining money from his prisoner, or a church-warden from the parishioners, *under colour of their respective offices*, have been determined to be guilty of extortion.‡ And an Under-Sheriff refusing to execute process before his fees were paid, has been held guilty of requiring what was *not yet due*.‡ These instances are sufficient to show how a Coroner may become guilty of this offence. The statute of Edward I. before noticed, which was made in *affirmance* of the common law, declares it to be extortion of any Sheriff, or *other minister of the King, whose office any way concerns the administration or execution of justice, or the common good of the subject*, to take any reward, except what he receives from the King.

**Punishment** At common law, such offences were severely punishable by fine and imprisonment, and removal from office; but by the statute just referred to, extortion in Sheriffs, Escheators, Bailiffs, Gaolors, King's Clerks of the markets,

\* Co. Lit. 368.

† 8 Mod. Rep. 226.—Siderfin. 307.

‡ Salk. 330.

CORONER.

and other inferior ministers and officers of the king, whose offices do any way concern the administration or execution of justice," &c. are declared to be moreover punishable by "yielding twice as much" (as each of such persons may have received, and to the party having paid it,) beside the former punishment according to the common law.\*

By the express words of their commission, the Justices in Session have cognizance of this offence of extortion; therefore, as has been observed, the Coroner *must* be a suitor to this court for his legal and authorized fees, and may appear before them as a culprit, if he require more than the law allows; and let it be observed, that all who *aid in*, or *contribute to* the offence, are equally principals; for there are no accessories in extortion.†

The indictment must state the fact *particular*, and the time when committed; but the magnitude of the sum is immaterial, for be it ever so small, it is equally an offence, which consists in the *mere taking*, not in the *value*, of the contract.‡ Little remains to be noticed respecting the superintendance of the Sessions over the conduct of Coroners, and that little arising out

\* 2 Co. Inst. 210.—1 Hawk. c. 68.

† 1 Str. 75.

‡ 1 Id. Raym. 149.

of special directions on this subject, elicited from *Graham (Baron)* in his charge to the Grand Jury at Lincoln summer assizes, 1814, by circumstances which it is not necessary to advert to, wherein he reprobated in strong terms the appointment of *deputies* by Coroners, who are ignorant of the law. The office is a judicial one, and it may be a matter of serious enquiry how far it ought to be executed by deputy; at all events, it should be by those who are appointed to similar duties elsewhere; who, it is to be presumed are equally skillful in the subjects to be considered.

**Coroner not being able to view the body.** Cases may occur also, where the conduct of the Coroner may become the subject of enquiry, respecting the proper execution of his duty, "relative to his viewing the dead body."

He can only take *his* inquisition of deaths "upon actual view, and not otherwise"; but he is, generally speaking, authorized to take such view any time within fourteen days, even that the body should have been interred.\* Yet there may be instances, in which such exercise of his authority would be improper, as in those of sudden death accompanied by infectious disease. In such, and the like cases, the enquiry becomes one of the duties of Justices of the Peace, to whom it ought to be referred "to enquire of the death," as a view of the body is not necessary to *their* process.†

\* 2 Hawk. c. 9.—Brd. Coron. 167.

† 5 Co. Rep. 110.—Hale's Pl. 170.

In such instances, however, the investigation of the Coroner's conduct becomes a very proper subject for the Court of Session of the Peace, (as otherwise bodies may be interred under suspicious circumstances, and frivolous pretences, without either his authority, or that of Justices) and points out the *benefit*, at least, of his attendance upon the Court, even though the necessity for it be strictly confined the limits before mentioned.\*

*Indictment of a Coroner for refusing to take an Inquisition.*

"County of ——, "The jurors for our Lord the —————, " King present, that on ————— "day of ————— in the ————— year of the reign

It may be a subject not unworthy further investigation, especially after the notice taken of it by the judges already mentioned, how far a Coroner ought, in my instance, to be popularis disputy;

As a general rule, it may be observed, that judicial duties cannot be depated; and it does not appear why such a rule should be departed from in the instance of a Coroner, on account of any inconvenience that could ensue; for we may observe, from what has just been laid down, that the Justices have a jurisdiction over the subject, to be exercised in cases to which the Coroner's cognizance does not extend, and that not by way of appeal from his judgment, but an original one; therefore it should seem there need not in *any* instance be any failure of justice from the inability of the Coroner to attend.—How far, and in what mode, Justices may be employed

66  
CORONER,

“ of our Sovereign Lord George, &c. &c. one A.  
“ B. at —— in the said county of —— was  
“ drowned and suffocated in a certain pond, and  
“ of that drowning and suffocating then and  
“ there died ; and that the body of the said A.  
“ B. at —— aforesaid, in the county aforesaid,  
“ lay dead, of which one C. D. late of —— in  
“ the county aforesaid, gentleman, afterwards,  
“ to wit, on the said —— day of —— in  
“ the year aforesaid, then being one of the  
“ Coroners of our said Lord the King for the  
“ county aforesaid, at —— aforesaid, had  
“ notice ; nevertheless the said C. D. the duty  
“ of his office in that behalf not regarding, af-  
“ terward, to wit, on the said —— day of  
“ —— in the year aforesaid, at —— aforesaid  
“ in the county aforesaid, to execute his  
“ office of and concerning the premises, and to  
“ take inquisition for our said Lord the King,  
“ according to the laws and custom of the realm,  
“ unlawfully, obstinately, and contemptuously,  
“ did neglect and refuse, and that the said C.  
“ D. no inquisition in that behalf as yet hath  
“ taken, to the great hindrance of justice, in  
“ contempt of our said Lord the King and his  
“ laws, and against the peace, &c.”

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able to give their services on such occasions, is a subject —  
within the limits of the present enquiry; — but, that they may  
legally, seems to be as unquestionable, as that they may pro-  
ably do it. — 1. Hale's Hist. 414.

GAOLERS.

GAOLERS are the next in order of officers <sup>to</sup> Gaolers, whose attendance upon the Courts of Quarter Sessions is necessary; under which denomination are comprehended all persons who have the custody or superintendance of the prisons, to which the jurisdiction and cognizance of the Sheriff, or the Justices, of the county, extend; whatever may have been the usual title or appellation by which any of such Gaolers may have been distinguished.

Their principal business is to bring the prisoners in custody who are to take their trials; vagrants who have been committed, and are either to be discharged or further imprisoned; to receive the passes of such as are to be carried to their respective places of settlement; and to take charge of such other prisoners as may be committed to their custody by the court.

But there are other duties also prescribed by divers acts of parliament. For example, "if the master of every *house of correction* shall not at every Quarter Session, yield a true account of all persons that have been committed to his custody; or if any person committed to his custody shall be troublesome to the county, by going abroad, or otherwise shall escape away from such house of correction before he shall be lawfully discharged therefrom, the Justices in such Session shall set such fine upon him, as

as they think fit, to be paid to the treasurer." And by another statute, the Justices in Sessions are required, "to call upon the Keeper of every *house of correction* within their jurisdiction, to produce to them in writing a list of the several persons then in their custody, with a description of the offence, and the time for which committed, distinguishing particularly those who by *warrant of commitment* are to be kept to hard labour, and also distinguishing the age and sex of every such person committed to hard labour, and in what trade or business he hath been employed, and what he hath been most accustomed to, and is best qualified for, and how he has behaved during his confinement. And by a still more recent statute, "every Gaoler shall at the Michaelmas Quarter Session, yearly, deliver a certificate, signed and verified on oath before such court, (or in case of sickness or inability before a justice) expressing (after each of certain provisions there enumerated (and which are directed by previous statutes)) whether such provision is, or is not, complied with, or observed, within such gaol, and such certificate shall be read publicly in open court, in the presence of the Grand Jury, and entered on the records of the Sessions." And the Justices are

7 Jac. I, c. 4.

22 Geo. 2, c. 64.

29 Geo. 3, c. 67.

§ See Pract. Expos. Tit. GAOLER, Sect. 2.

further directed "to take such certificate into consideration, and to summon any such person named therein as shall seem meet; and every county gaoler who shall neglect to deliver such certificate, shall forfeit 50*l.*, and every other not a county Gaoler 20*l.* to be recovered in the courts of Westminster."

*Form of the Certificate.*

"At the General Quarter Session of the <sup>Certificate</sup> ~~to the Mr.~~  
"Peace for the said ——— holden at ——— <sup>Chapman</sup>  
"this ——— day of ——— in the year of our Session.  
"Lord ——— the certificate of ———  
"in pursuance of, the statute in this case,  
"made and provided respecting the gaol of  
"———"  
"By the statutes also, for the relief of insolvent debtors, certain duties are imposed on Gaolers, to be performed at Sessions, which render their presence there necessary; as, for example, by the very last statute of this kind, they are required to deliver lists of the debtor prisoners in their custody, and to verify the same on oath, before the Justices assembled.

The salaries of Gaolers also, occasionally become the subject of the Justices' cognizance in Sessions, under certain circumstances, unnecessary to be noticed further, than by reference to the statute,† the present purpose be-

in the 54 Geo. 3.

† 24 Geo. 3, c. 54.

They answered, by only shewing the multiplied occasions for their attendance at the Sessions.

**Constables.** **THE CONSTABLES**, as well of hundreds, as of parishes, are bound to attend the Quarter Sessions.\* The Constables of hundreds, or chief Constables, to make return of the warrants directed to them previous to the Sessions; to receive the instructions of the Justices, to make presentments relative to offences within their Constablewicks, and to report the state of the King's peace within the same. Such at least are the general duties assigned to them by the Statute, and from the original foundation, of their office. Beside these, however, innumerable others have, from time to time, been imposed upon them by Statute, of an amount too considerable to be distinctly enumerated; no any profitable purpose here; as many of them, although more, or less, connected with their attendance upon the sessions, are to be executed, *out of them.*†

\* Dalt. 155.—Cro. Cir. Com. 34.

† By way of example, and to show the inconvenient extent to which the particular notice of every law relative to

" The petty Constables are called over, and Petty Constables confined by the court if they do not attend. Their duties, relative to their parishes, are, in a great degree, similar to those of their Chiefs respecting the hundreds, with some additional ones; such as reporting the state of their respective parish stocks, giving evidence respecting the execution of warrants wherewith they may have been charged, and all other matters pertaining to their office, both as conservators of the peace, and as ministers of the Justices.

The chief Constables are moreover directed by statute, \* \* \* at the General, or Quarter, Sessions, if thereunto required, to account for the general county rate by them received ed, on pain of being committed to gaol, until they shall account; and shall pay over this money, in their hands, according to the orders of the said Court, on the like pain. And

these descriptions of duty, would multiply these pages, one of them, by a recent statute, will be sufficient.

" Within ten days after every session at which any Justice shall have returned any conviction, whereon he has received his fine or forfeiture, the clerk of the peace or town clerk shall deliver to the Chief Constable of the district where any person shall reside, who shall be entitled to any share of such fines, an account in writing of such fines, &c. which Chief Constable shall transmit an account thereof to the petty Constable of the parish, that notice may be given to the person entitled, &c." 41 Geo. 3, c. 20.

all the accounts and vouchers shall, after having been passed at the said Sessions, be deposited with the Clerk of the peace, to be kept among the records, and inspected by any Justice without fee."

To deliver lists of jurors from the petty Constables. They are also to deliver in the lists received from their petty Constables of jurors, and to verify the same by oath.

High Constables appointed and sworn at sessions. High, or chief Constables, are always chosen at some Session, either Special, General, or Quarterly, in order that an officer, in whom all the acting Magistrates of the county, or division, have no great an interest; devoting their immediate servants, and auxiliaries, to the preservation of the peace, and the links between them and all the petty Constables throughout their jurisdiction, may have, if they think fit, a voice in his nomination to the office. They are always sworn into the office, either at some such Session, or by warrant from the same.†

Petty Constables appointed, &c. there.

Petty Constables too, though sometimes appointed in courts Leet, according to ancient practice, and occasionally sworn into office either by the lord of such court, or by a single Justice, are now generally nominated by their respective parishes in vestry, and sworn into office by the Justices at the Quarter Session,

\* 3 Geo. 2, c. 26.

† Dalt. c. 28.

which is, on every account, the better, and more regular mode.\* It has also been decided, that the Justices in Sessions are the proper judges where it is right to appoint Constables for places that have not had any before.†

So necessary a part of the general system, for the preservation of the peace, are Constables, that the Court of King's Bench will grant <sup>Mandamus</sup> <sub>compel justices to swear Constables.</sub> mandamus to compel the Justices to swear such as have been duly appointed; and if, on the other hand, a Constable duly chosen, refuse to take upon himself the office and be sworn, he may be indicted at the sessions, (or assizes,) and if convicted, shall be fined.‡

High Constables are required to take the oaths to be <sup>taken by</sup> <sub>Constables.</sub> oaths of allegiance, supremacy, and abjuration; and others who qualify for offices; but they are not required to receive the sacrament, or to subscribe the declaration against transubstantiation; and petty Constables are exempt from both species of test; but must take the *oath of office*, which is as follows:—

“I will well and truly serve our Sovereign  
“Lord the King, in the office of Constable  
“for the ——— in the county of ——— for the

\* 2 Hawk. c. 10.

† 1 Keb. 554.

‡ 2 Hawk. c. 10.

§ 2 Str. 928.—Cro. Car. 567.

|| 1 Geo. 1, c. 2.

"year ensuing, and till another be appointed  
"in my place, according to the best of my  
"skill and knowledge."

"So help me God."

**Fees of Constables**—In particular instances the Quarterly Sessions have cognizance of the fees of Constables for justices in the execution of certain parts of their duty.

**Special Constables** are entitled to a reasonable remuneration for their services in executing warrants in cases of **FELONY**, to be allowed by two Justices, subject to the confirmation of the Justices at the next Quarter Session, whose order on the treasurer of the county for payment is necessary. And by a similar mode of proceeding, **high Constables** are to be remunerated for extraordinary exertions in cases of **TUMULT**, **MURDER**, or **FELONY**.

**In Parochial business**—Also in the execution of **PAROCHIAL BUSINESS**, Constables, and all persons acting in the capacity of Constables, having delivered their accounts to the overseers of the poor of their respective parishes, are placed ultimately under the controul of the Justices in Session, respecting the liquidation of such accounts, where any dispute or difference of opinion arises upon them. And the Justices so assembled have moreover a power of laying down any rules and regulations *prospectively*, respecting such

allowances to Constables generally for such occasions; subject to the approbation of the judge of assize.\*

All Constables duly appointed who neglect attending at the sessions, or answering when their names are called over, are subject to be fined at the (reasonable) discretion of the court.†

In such manner as Constables are appointed Removal of and by the like authority, they are to be discharged. So that if there be cause to remove a high Constable, it ought not to be done by a single Justice or two, but at the Quarter Sessions; or at least at a Special Session, where all the Justices for the district may have an opportunity of giving their opinions.‡

And for similar reasons the Sessions have power to remove all Constables on proper causes.||

And it is provided by statute, that if a Constable continue above a year in his office the Justices in Session may discharge him and put another in his place.|| And if the Court refuse to discharge, a writ of *mandamus* will lie.¶

\* 18 Geo. 3, c. 19.

† Cro. Cir. Comp. 34.

‡ Dalt. c. 28.

§ 2 Hawk. c. 10.

|| 13 & 14 Geo. 2, c. 12.

¶ 2 Hawk. c. 10.

Fined for  
non-atten-  
dance.

Removal of  
Constables.

Discharged  
after a quar-  
ter's service.

**May appoint.** The office of Constable being principally a *deputy*. a ministerial office; he may appoint a *deputy* on any occasion to do a *mere ministerial* <sup>work</sup>; and this extends to all sorts of Constables; and so far as regards petty Constables (who are frequently women, or persons incapable from age and infirmity) they may appoint *deputies* to do the *whole* business of their office; but then such *deputy* must be accepted and sworn by a proper authority; in which case he must make all appearances for his principal, and execute all the acts of his office; for by the acceptance and swearing of the *deputy*, the principal is discharged from responsibility.†

**Jurors.**

THE JURORS are of course necessary attendants upon the Sessions, for the trial of prisoners. The proceedings, oath, misbehaviour, and punishment of Jurors, are subjects which come more properly under consideration in the succeeding chapter; but their qualifications, exemptions, and the process for convening them, belong peculiarly to this.

**Grand Jury.** Juries are distinguished also into Grand, and Petit (or Petty) Juries. Grand Juries must consist of thirteen at least, but not of more than twenty three: of not less than thirteen, because

\* 3 Burr. R. 1259.

† 3 Esp. R. 56.

every bill must be found by *twelve at least*,  
of not more than twenty-three, lest there should  
be an equal division of opinions, in which  
event no bill could be found.\*

Upon the summons of any Session of the <sup>How return-</sup> <sub>ed.</sub> Peace, there goes out a precept under the hands  
and seals of two Justices of the county, division,  
&c. directed to the Sheriff, upon which he is  
to return *24 or more* out of the whole county,  
division, &c. out of which the grand inquest  
are to be taken.

Of the Grand Juries returned, therefore, to  
the Quarter Session, it is not an unusual prac-  
tice, after 15 or 16 names have been called,  
to consider the inquest as complete, and not  
to insist upon the remainder, who may happen  
to be present, serving.

A Petit Jury can only consist of 12, and <sup>Petit Jury.</sup> must be precisely that number, all of whom  
must agree in the verdict given; but they are  
taken by ballot out of the whole number re-  
turned, which is usually 49, (subject to chal-  
lenge to be noticed hereafter) although the  
precept commonly requires only 24; but the  
award or precept to try a prisoner after he  
has pleaded, is only *venire facias* twelve, and  
twenty-four are returned upon that panel.†

*"And, to the end that sheriffs may be the better informed of persons fit to be returned on juries,"* <sup>Returning lists.</sup>

\* 2 Burr. R. 1088.

† 2 Hale's Hist. 269.

Precepts to the Justices at the Quarter Sessions next after the high and 24th June, shall issue forth their warrants mable to make under the hands and seals of two or more of them, and return lists of jurors to the high constables, requiring them to issue

forth their precepts to the petty constables, thereby directing and requiring them to meet together with the head constables, within fourteen days next after, at some usual place, where the petty constables shall prepare and make a true list, fair written, and signed by them, of the names and places of abode, of all persons within their respective constablewicks, qualified to serve on Juries, with their titles and additions, between the ages of twenty-one and seventy ; and any head constable failing to issue forth his precepts as aforesaid shall forfeit 10/. and every petty constable failing to meet the head constable, and failing to prepare and make a true list, shall forfeit 5/. and every such offender shall be prosecuted at the general assizes, sessions of Oyer and Terminer, or general gaol delivery, or sessions of the peace.\*

Petty constables may inspect parish rates. And the petty constable shall on request to any parish officer, who shall have in his custody any of the rates for the poor, or land tax, have liberty to inspect such rates, and take the names of such persons qualified dwelling within their precincts.

And shall yearly, twenty days at least before Lists to be  
 Michaelmas, upon two Sundays, fix upon the <sup>put on the</sup> church  
 door of the church, within their precincts a list <sup>church</sup> doors  
 of all such persons intended to be returned to  
 the Quarter Sessions, and leave a duplicate of  
 such list with the church-warden or overseer of  
 the poor.

And if any person not qualified shall find And persons  
 his name mentioned in such list, and the per- <sup>not qualified</sup> struck out.  
 son required to make such list shall refuse to  
 omit him, the Justices at their Quarter Session,  
 on satisfaction from the oath of the party com-  
 plaining, or other proof, shall order his name  
 to be struck out.

And if any person required to make up such Penalty on  
 list, shall wilfully omit any such person whose <sup>constable</sup> inserting  
 name ought to be inserted, or insert any who <sup>names</sup> <sup>wrongfully</sup>  
 ought to be omitted, or shall take any reward  
 for omitting or inserting any person, he shall  
 for every person so omitted or inserted, forfeit  
 20s. on conviction before one Justice, on the  
 confession of the offender, or proof by one  
 witness &ri oath; one half to the informer, the  
 other half to the poor of the parish; and if  
 the penalty shall not be paid within five days, it  
 shall be levied by distress and sale of goods, by  
 Warrant from one Justice. And the Justices be-  
 fore whom such person shall be convicted,  
 shall certify the same to the next Quarter Ses-

ation, which shall direct the clerk of the peace to insert or strike out the name, \*  
 Return of which list the said petty constables shall lists by petty constables, yearly on pain of 5*l.* return and give to the Justices in open court, upon the first day of the general Quarter Session to be holden in the week after Michaelmas.†

Or instead of this, "it shall be sufficient for them, after they have completed the lists for their precincts, to subscribe the same in the presence of one Justice, and at the same time to attest the truth of such lists upon oath, to the best of their knowledge and belief, and the lists shall, being signed by the Justices, be delivered by them to the high constable, who are to deliver in such lists to the Quarter Sessions, attesting upon oath the receipts of such lists from the petty constables, and that no alteration hath been made since the receipt thereof."‡

To be entered in a book. The Justices shall then cause the lists to be fairly entered in a book and kept among the records of the Sessions.§

Duplicates to be transmitted to the Sheriff. And duplicates of the lists, so delivered and entered at the Sessions, or within ten days after,

\* 3 Geo. 2, c. 25.

† 3 & 4 Anne, c. 18.

‡ 3 Geo. 2, c. 26.

§ 7 & 8 Wm. 3, c. 32.

shall be transmitted by the clerk of the peace to the sheriff.\*

Constable failing to make return shall forfeit £1. to the King, to be recovered by failing to make return. <sup>Constable failing to make return.</sup>

And if any person not qualified shall be returned, the Justices in Session may, on being satisfied by the oath of the party, order his name to be struck out, or committed to be entered in the book.†

“All Jurors (other than strangers upon trials <sup>Qualifications of Ju-</sup> <sub>per medietatem regnum</sub>) to be returned for trials <sup>rors by es-</sup> <sub>of issues joined before Justices of assize or nisi</sub> <sub>tate.</sub>

prius, oyer and terminer, gaol delivery, or Quarter Sessions, in any county of England, shall have within the county £2. by the year of freehold or copyhold, or ancient demesne, or in rents, in fee-simple, fee-tail, or for life; and in every county of Wales, every such Juror shall have £1. by the year as aforesaid; and if any of a lesser estate be returned he may be discharged upon challenge or on his own oath.”§

“And persons having an estate in possession in land in their own right, of 20l. a year above the reserved rent, being held by lease for 99 years or more, or for 99 years, or any other

\* 3 Geo. 2, c. 25.

† 7 & 8 Wm. 3, c. 32.

‡ 3 Geo. 2, c. 25.

§ 4 & 5 Wm. 3, c. 24.

term, determinable on one or more lives, shall be liable to serve on juries.”\*

In York-shire.

“ But no person having such estate as will qualify him to serve on Juries, of the yearly value of 150*l.* or more, shall be returned to serve upon any Jury upon any Session of the Peace for any part of the county of York, upon pain of 20*l.* to be recovered for the use of the informer in any court of record at Westminster by action.†

And if any such person shall serve as a Juror at any of the said Sessions, he shall not be thereby exempted from serving at the assizes for the county of York.”‡

Jurors not appearing according to their summons, are punishable by loss of issues, which usually make up part of the estreats of the several Sessions.§

**Exemptions.** It is scarcely necessary to examine with particular minuteness, what persons among the higher orders of society may claim an exemption from serving on Grand Juries at the Sessions, as it is not the practice to summon any such, as are on the Sheriff’s list to be summoned for the assizes; but it is understood to be a general rule, that members of either House

\* 3 Geo. 2, c. 25.

† 1 Anne, st. 2, c. 13.

‡ 10 Anne, c. 14.

§ Cro. Cir. Com. 34.

of Parliament, barristers, attorneys, medical persons actually practising their profession, and clergymen of the establishment, shall be exempt from serving.\* Dissenting teachers, having qualified under the toleration acts;† Quakers;‡ Roman catholic ministers;§ and visitors of work-houses|| are severally exempt by statute; and the following descriptions of official persons claim a similar prescriptive privilege.—coroners, verdierers, foresters, officers of the army and navy, and persons in trust under government, whose duties require personal attendance.¶

SUITORS OF THE COURT, is an appellation <sup>so consider-</sup> Suitors, who which in its restricted sense, may be supposed to signify only those who have some voluntary suit to prefer;—but in its colloquial, as well as legal, application, it is descriptive of all persons who have any duty to perform, or any *necessary business* to execute, voluntary, or official, before the Court.

Under this larger description are comprehended all prosecutors, whether voluntary, or

\* Lamb, 396.

† 1 Wm. c. 18.—19 Geo. 3, c. 44.—52 Geo. 3, c. 155.

‡ 7 & 8 Wm. c. 34.

§ 31 Geo. 3, c. 32.—43 Geo. 3, c. 30.

|| 22 Geo. 3, c. 83.

¶ 3 Bac. Ab. 261.

bound by recognizance; as also all those bound to answer, and those to give evidence.

Suits, how prosecuted. It is said generally, that *all offences* shall be prosecuted at the Sessions by presentment, information, or indictment.\* But if jurisdiction be given to the Sessions, to *hear and determine*, and it be not said "by information," it shall be understood that the prosecution is to be by indictment, and not information.† And for all crimes within the cognizance of the Sessions of the Peace, the Justices may grant their warrant against offenders, and either commit them, or bind them over to appear, as the case may require.‡ The latter is done by recognizance, in some such form as the following:

Recognizance. " You A. B. acknowledge to owe to our sovereign Lord the King the sum of 40/-; and " you C. D. and E. F. (the pledges) each of you " acknowledge yourselves to owe to our sovereign Lord the King, the sum of —— to be levied " upon your several goods and chattels, lands " and tenements, by way of recognizance to his " Majesty's use, upon condition, that if you " A. B. shall be, and appear, at the next Session " of the Peace, &c. [or as the condition is]

\* Com. Dig. Tit. Justice.

† Dalt. c. 191.—4 Term R. 115.

‡ Hale's Hist. 579.

"then this recognizance to be void, or else  
"remain in full force."

To which recognizance the Justice is to subscribe his name; but the persons bound need not set their names to it, for it is witnessed only by the record, and not by the party's seal.\*

And a recognizance taken by a Justice of the Peace is a matter of record, so soon as it is taken, and acknowledged; although it be not made up, but only entered in his books.†

"And every Justice that shall take any recognizance for the keeping of the peace, shall certify the same to the next Session, that the party bound may be called; and if he make default, the same default shall be recorded, and the recognizance, with the record of the default, be sent and certified into the *Chancery, King's Bench, or Exchequer.*"‡

The condition which is expressed in the recognizante (to prefer an indictment, or to plead to an indictment,) made applicable to the persons respectively who are to be bound, being the principal variation in the form as applied to the different parties, viz. the prosecutor, and the offender, the above precedent

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\* 2 Black Com. 341.

† Dalt. 168.

‡ 3 Hen. 7, c. 1.

*mutatis mutandis*, is that by which they are both brought before the Court, only that the recognizance of the prosecutor is usually (tho' not necessarily) without pledges, and that the recognizance for bail in felony, must be taken before two Justices.\*

Not all offenders to be brought by warrant before the session previous to indictment. It is not necessary, however, nor is it usual, and in some offences would be positively irregular (as *ex. gr.* in perjury, although under the stat.)† to bring the party charged before the Session under a Justice's warrant, previous to a bill of indictment having been found. The distinction usually laid down is this:—for all felonies, and misdemeanors which subject the offender to *corporal* punishment, and actual breaches of the peace (which last comprehensive term includes every case in which such extreme caution can be necessary) it is usual for the Justices to issue warrants in order to secure the appearance of the persons accused, before the Session; but for all other offences, to prefer an indictment before the grand jury, and if the bill be found by them to make it the foundation of all ulterior proceedings.‡

\* 1 & 2 Ph. and Mar. c. 13.

† It is laid down, indeed, by Dalton, that a Justice may bind over a party accused of perjury to the sessions for trial, but such a proceeding is contrary to all practice.—Dalt. c. 70.

‡ In which case a process, denominated a *Bench-warrant*, issues, for which see the next chapter.

Having considered then how prosecutors and <sup>Witnesses.</sup> offenders are brought before the court, it only remains to notice the processes by which witnesses are compelled to attend.

When any offender is brought before a Justice by warrant, or otherwise, beside the informant, and any witnesses who may happen to be voluntarily present, (and whom it has already been seen it is the duty of the examining Justice to bind by recognizance to appear at the Session) there may be others known to him, whose testimony may be necessary, or at least useful, on the occasion.\* These the Justice may issue his *warrant* to bring before him, to be examined touching the matter in question in the following form:† but it is more common, in the first instance, especially if they be respectable persons, to make it only a summons,

“—————, { “To the Constable of ——————  
to wit,

“Whereas oath hath been made before me, Warrant for.  
“W. D, Esquire, one of his Majesty's Justices  
“of the Peace in and for the said county, by  
“P. Q. of ——————, that the said P. Q. was  
“lately robbed at —————— and that he hath  
“good cause to believe that X. X. of ——————  
“is a material witness to prove by whom the  
“said robbery was committed: These are  
“therefore to require you to cause the said

\* See Practical Expos. Title, EXAMINATION. † Dalt. §. 164.

“ X. X. forthwith to come before me, to give  
 “ such information and evidence as he knoweth  
 “ concerning the said offence, that such further  
 “ proceedings may be had therein as to the law  
 “ doth appertain. Given under my hand and  
 “ seal at \_\_\_\_\_ in the said county, the  
 “ \_\_\_\_\_ day of \_\_\_\_\_.”

If his evidence be found by the Justice to be material, he must then be bound by recognizance to attend at the Session of the Peace, and give it to the Court and Juries there, in something like the following form, varied according to the circumstances of the offence ; and if he refuse to enter into such recognizance, the Justice may commit him to gaol ;\* wherein, if he obstinately continue till the session, he may be brought up to the court by writ of *habeas corpus ad testificandum*.†

Lord Preston, being committed by the Court of Quarter Session for refusing to be sworn to give evidence to the Grand Jury, on an indictment of high treason, he was brought by *habeas corpus* into the court of King's Bench ; and Holt, Ch. J. said, It was a great contempt, and that had he been there, he would have fined him, and committed him till he paid the fine ; but being otherwise, he was bailed. ed.‡

\* 1 Hale's H. 586.

† 31 Car. 2. c. 2.—44 Geo. 3, c. 102.

‡ Salk. 273.

*The Form of a Recognizance to appear and  
give Evidence in a Case of Felony.*

“ Be it remembered, that on  
to wit, the —— day of —— in  
the —— year of the reign of our sove-  
reign Lord George the Third by the grace  
of God of the United Kingdom of Great  
Britain and Ireland, King, defender of the  
faith, &c. A. W. of ——, in the said county  
of —— tanner, personally came before me, J.  
P. Esq. one of the Justices of our said Lord  
the King, assigned to keep the peace in and  
for the said county, and acknowledged him-  
self to owe to our said Lord the King the sum  
of 10*l.* of good and lawful money of Great  
Britain, to be made and levied of his goods  
and chattels, lands and tenements, to the use  
of our said Lord the King, his heirs and suc-  
cessors, if he, the said A. W. shall fail in  
the condition underwritten [or indorsed if it  
is so.]

“ Acknowledged before me,—J. P.”

“ The condition of the above [or within]  
written recognizance is such, that if the above  
bound A. W. do and shall personally appear  
before the Justices of our sovereign Lord the  
King, assigned to keep the peace within the said  
county, and also to hear and determine divers  
felonies, trespasses and misdemeanors, in the  
said county committed, at the next general  
Quarter Session of the Peace [or before his

Majesty's Justices of Gaol Delivery, at the next general Gaol Delivery to be holden at \_\_\_\_\_ in and for the said county,] and do, and shall then, give such evidence as he knoweth upon a bill of indictment to be exhibited by A. I. of \_\_\_\_\_, to the grand jury, against O. O. late of \_\_\_\_\_, in the said county, labourer, for the feloniously taking and carrying away — the property of \_\_\_\_\_: and in case the said bill of indictment be found a true bill; then if the said A. W. do and shall then and there give evidence to the jurors that shall pass on the trial of the said O. O. upon the said bill of indictment, and not depart thence without leave of the court; then the above [or within] written recognizance to be void, otherwise of full force."

If the party, entering into the recognizance, neglect to appear according to the condition, it will become forfeited, and be *estreated* into the Exchequer."

**Subpoena.**

The process to bring such witnesses as have not been bound by recognizance to appear, whether on the part of the prosecution, or for the prisoner, is by *subpoena*; which (whatever may have been the law formerly)\* is now to be obtained in all cases whatsoever,† and in the following form, with such variations only as the particular instance may require.

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\* 2 Hawk. 46.      † 7 Wm. 3, c. 3.—1 Anne c. 9.

*The Form of a Subpœna to give Evidence at the  
Quarter Sessions.*

“ George the Third, by the grace of God,  
“ of the united kingdom of Great Britain and  
“ Ireland, king, defender of the faith, to A. B.  
“ C. D. E. F. and G. H. (not putting more  
“ than four in one subpœna), greeting: we  
“ command you, that all and singular business  
“ and excuses being laid aside, you, and every  
“ one of you, be, and personally appear in your  
“ own proper persons, before our Justices as-  
“ signed to keep the peace, in and for our  
“ county of ——, and also to hear and deter-  
“ mine divers felonies, trespasses, and other  
“ misdemeanors, in the said county committed,  
“ at the General Quarter Session of the Peace,  
“ to be holden at —— in and for the said  
“ county, on Wednesday the —— day of ——,  
“ at the hour of —— in the forenoon of the  
“ same day to testify the truth, and give evidence  
“ before the grand inquest touching a bill of  
“ indictment to be preferred against —— in  
“ a case of trespass and assault.”

Or, if it be to give evidence for the prosecu-  
tion, say,

“ On our behalf against —— in a case of  
“ trespass and assault.”

If for the defendant, say,

“ Between us and —— in a case of trespass  
“ and assault.”

Or if the king is not a party, say,

“ In a certain appeal now depending between  
“ the church-wardens and overseers of the  
“ poor of the parish of A, appellants, and the  
“ church-wardens and overseers of the poor  
“ of the parish of B, respondents, touching and  
“ concerning the removal of C. D. from the  
“ said parish of B, to the said parish of A.”

And then proceed,—

“ And this you, or any of you, are by no  
“ means to omit, under the penalty upon each  
“ of you of 100*l.* Witness —————, at  
“ ————— aforesaid, the ————— day of —————,  
“ in the ————— year of our reign.

“ Y. Z. clerk of the peace.”

This subpoena is made out by the Clerk of the Peace, and each of the witnesses must be personally served, either with a copy, which is now most usual, or with a notice in the following form:

“ To Mr. A. B.

“ By virtue of his Majesty’s writ of subpoena  
“ to you directed, and herewith shewn unto  
“ you; you are personally to be and appear  
“ before his Majesty’s Justices,” &c. [pursuing  
the form of the subpoena, as far as the words  
“ in a case of ”;] “ and this you are not to  
“ omit, under the penalty of 100*l.* Dated this  
“ ————— day of —————, in the ————— year of  
“ the reign ————— &c.”

The last subject of enquiry under this division is, what privileges or immunities the pro-

ction of the Court confers upon Suitors of every description, as auxiliary to the advancement of public justice.

And it is universally laid down that all persons may freely attend at the Sessions, for the advancement of public justice, and for the service of the King; and to this end, they are, as it were,

invited thither by a certain freedom of access, and by protection from common arrest in civil actions; a thing that is incident to every court of record, and without which justice would be greatly hindered; so that if a man come voluntarily to the Sessions, either to prefer a bill of indictment, or to give information against another, or to tender a fine upon an indictment touching himself; or come compelled to make appearance for saving his recognizance, and be arrested in his coming thither, or during his tarrying there, or on his return, it seems that upon examination of the matter under his oath, he shall be discharged thereof by the privilege of the Court of Session, the same as in the Courts of Westminster.\*

But to have this privilege the party must appear in person, that the court may examine him, and be satisfied upon his oath, that he was either prosecuting, or defending, some suit pending in that court, when he was arrested.†

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\* Lamb. 442.—2 Str. 987. † Ibid.

Privilege of  
person in-  
terpreted  
liberally.

Moreover, upon the principle of furthering justice, and even holding out invitation to all persons to attend the Courts, great latitude has been allowed in construing the extent to which this privilege of their person shall be carried. Thus, a man shall not be required, when going to a Session, to proceed in the direct road, and the protection is not forfeited by the allegation, that he went out of the way, because it may be, the party went to buy a horse, victuals, or other necessaries for his journey. Neither is the law so strict in point of time, as to require a person to set out immediately after the trial is over; for where a woman had a trial at Winchester assizes, which was over at four in the afternoon, and she staid there till after dinner on Saturday; and in the evening at seven, was arrested going home to Portsmouth, which is twenty miles, the Court held that she ought to be discharged, her protection not being expired, and a little deviation, or loitering on the way, would not cancel it.\*

And indeed of late years, in all cases where this privilege of person in attending judicial proceedings of all kinds has come in question, the decisions have been uniformly favorable to its extension.†

But it seems that if a man be arrested by

\* 2 Str. 987.

† 3 East R. 89.—8 Term R. 534.

process out of the Courts at Westminster, the Sessions have no power to discharge him, unless he be so arrested in the face of the Court,\* which would be a contempt, and punishable accordingly.

Neither shall a man who attends the Court without any sufficient cause, to do a mere voluntary act there, be privileged in going and returning; as if a defendant go to the Court to confess an indictment, for there is no occasion, and no process which should compel him to attend.†

**PLEADERS.**—Every man has a natural right Person to defend himself, or plead his own cause, which no municipal regulation can deprive him of, without manifest injustice. Whether it may be more prudent for each individual to exercise that right, or to entrust his protection to other hands, he, and he alone, ought to have the privilege of determining.‡ But where the

\* 2 Hawk. c. 1. † Salk. 544.

‡ It has been a common observation in the Courts, that the man who advocates his own cause, has a fool for his client." There is much levity, but some truth, in the observation, and especially when applied to such persons as are in general the Suitors of the Court of Quarter Session; because both ignorance and prejudice commonly unite to prevent them from discovering the strong points of their case, and of enforcing them with effect; while a pardonable attachment to the display of irritating circumstances, irrelevant to the proper subject of discussion, distract the attention, and weary the patience of their auditors.

Suitors of Courts seek for assistants to advocate their interests, all Courts have claimed, and apparently with reason on their side, the right **Advocates.** of making regulations, on the condition of complying with which, such advocates should be admitted to plead. In the Courts of Quarter Session, this privilege has been confined, and very properly, to gentlemen of the legal profession; barristers, and attorneys. Where the former can be obtained, it has been usual "as the phrase goes," to "silence" the latter; or in other, and more respectful words, to prefer and encourage the superior order.

This preference may have been originally wrong in its principle, but it is unquestionably right in its practical effects; not that it is to be reasonably presumed more actual knowledge can be exhibited by a young barrister, ~~and~~ the commencement of his professional career, than by an experienced attorney; but because the latter is, perhaps, reluctantly obliged, and frequently unconsciously seduced, to mix, with his professional services, no inconsiderable degree of local prejudice, and jealous irritability; from which the stranger barrister may reasonably be expected to be exempt. Viewing the exercise of this duty, however, as confined to these two descriptions of persons, we have only to see what official engagements operate as a prohibition upon individuals.

**Barristers.** Of Barristers it is sufficient to observe, that

they are defined to be "Counsellors learned in the Law," admitted to plead "*at the bar*, and there to take upon them the protection and defence of clients."\* Serjeants and King's counsell, do not usually plead at Sessions, it being considered *infra dignitatem*; but among Barristers below these degrees, called *utter* or *ouster* Barristers, or Barristers *without the bar*, there seems to be no exception either of law or courtesy, so they be not constituent parts of the Court, as Justices on the Bench, or Clerk of the Peace.

Respecting Attorneys, there are many restrictions, both general and particular. "No person shall act as solicitor, attorney, or agent, or sue out any process at any General, or Quarter, Session of the Peace, without being admitted and inrolled according to law, on pain to forfeit 50/- to him who shall sue within twelve months, with treble costs; and if any attorney or solicitor shall permit any person not admitted and inrolled, to make use of his name in such Session, he shall forfeit 50/- in like manner.

And no Clerk of the Peace or his deputy, or any under sheriff or his deputy, shall act as a solicitor, attorney, or agent, at any General, or Quarter Session of the Peace of the county or place, where he shall execute his said office, on pain of 50/- as aforesaid."†

\* 1 Black. Com. 23.—Wood's Ins. 448.

† 22 Geo. 2, c. 46.

These prohibitions, however, only extend to persons who having some pretensions to act as attorneys, have either omitted to entitle themselves to such privilege, by a neglect of the previous forms prescribed by law, admission and enrolment; or who have become disqualified from acting in the capacity of attorneys, from having been invested with some office which the law declares to be incompatible. On the *latter* point the statute referred to is sufficiently specific; for the *former* ground of disqualification, it is necessary to resort to the other statutes on the subject in a general way, and in the order in which they were passed. The very early ones, however, being considered as obsolete, or irrelevant, it is sufficient to notice the effect of the more modern ones in the following order.

Prohibitions.

"No recusant convict shall practice as an attorney in any court, on pain of 100l. ; half to him that shall sue, and half to the King."

If an attorney be convicted of having delayed his client's suit, or of having demanded more than fees and disbursements, besides being liable to pay costs and treble damages to his client, he is declared to be "disabled from acting."†

"No person convicted of forgery, perjury, or common bartry, can practice as an attorney

\* 3 J. 1, c. 5.

† 3 J. 1, c. 7.

or solicitor, but shall be transported for seven years."<sup>\*</sup>

" No person shall act as an attorney or solicitor, unless he shall have been bound for five years, and served the same.<sup>†</sup> And the whole service must have been with the same attorney, or by his assignment,<sup>‡</sup> except in case of death, when such clerk may be turned over.<sup>§</sup> And he must be admitted, sworn, and enrolled before he can act as an attorney, under a penalty of 50 $\text{l}$ . and being *disabled* thereafter. But Quakers may be admitted on their affirmation."<sup>¶</sup>

Admission, and enrollment, presupposing a compliance with all the conditions enacted by statute, such as the payment of stamp duties, &c. it is unnecessary to notice those which are imposed on articles of clerkship, or any others which may be necessary in the process of qualifying to act as attorneys, merely as duties; but it must be observed that every attorney, to entitle himself to practice in that capacity, must "annually take out a certificate from the commissioners of stamps, under a penalty of 50 $\text{l}$ . and being *disabled to practice*."<sup>||</sup> Any attorney, therefore, who may

<sup>\*</sup> 12 Geo. 1, c. 29.

<sup>†</sup> 2 Geo. 2, c. 23.

<sup>‡</sup> 7 Term R. 456.

<sup>§</sup> 2 Geo. 2, c. 23. || 22 Geo. 2, c. 46.

<sup>¶</sup> 37 Geo. 3, c. 90.—39 and 40, do. c. 72.—and 48, do. c. 149.

have omitted to take out such certificate, has forfeited his right to act in that capacity in the Court of Quarter Session.

Having been struck off the rolls. It is almost unnecessary, in the last place, to observe, that any attorney who has been struck off the rolls of the Courts above, as sometimes occurs, for dishonorable practices, although not especially provided against by any positive law, is no longer an attorney of such superior Courts, and cannot, therefore, be permitted to practice in the inferior ones, and, of course, is not admissible in that of the Quarter Session of the Peace.

## CHAP. III.

## THE PROCEEDINGS BEFORE THE SESSIONS.

*Herein of the Matters over which the Courts of Quarter Session have a legal, or a customary, Jurisdiction; and the order of proceeding therein respectively.—The Duties of the Chairman, and other Parties.—An Abstract of the Laws, and an Epitome of the Subjects, which may be controverted or discussed, before them.*

## SECT. I.

By virtue of their commission, it is perfectly clear that Justices of the Peace may execute all statutes made for the keeping of the Peace, as well those made before the institution of their office, as since.\*

But they have also, by several particular statutes, authority given them over offences, created, described, prohibited, or punished, by those statutes respectively, which are not described in their commission.

The Justices of the Peace, are not, emphatically, Justices of *oyer and terminer*, for

Authority of  
the Sessions.

Justices of  
the Peace  
not design-

\* 2 Hawk. c. 8.

nated by Justices of the Peace, there is a distinct commission of that description; therefore statutes which limit an offence to be tried before *such* Justices, do not comprehend Justices of the Peace.\* On this ground, although before Judges of Assize popular actions, and indictments for misdemeanors, *may* be presented and tried at the same session, they *cannot* be before Justices of the Peace, but by consent; although felonies *may* be.†

**Felonies.** In as general terms, then, as brevity recommends; but as comprehensive, at the same time, as precision seems to require; the authority of Justices extends not *to hear and determine treasons or praemunire, although they may apprehend and examine the offenders, as they may do in every case of felony whatever* (of which these are but particular instances) *and commit them for trial; nor forgery, nor perjury at common law, but to the same extent.*§

**Murder and manslaughter.** Although the commission doth not mention *murders* and *manslaughters* by express name, but only *felonies* generally, yet by such general word they have power to hear and determine, murder and manslaughter, and also may take an indictment of *se defendo.*||

\* Hale's P. C. 165. † 2 Hale's Hist. 48.

‡ 2 Hawk. c. 8. § Ibid.

|| 2 Hale's Hist. 48.

But though Justices of Peace, by force of their commission, may have authority to hear and determine felonies, yet it has been generally thought advisable for them to proceed no farther than as above, in relation to murder or manslaughter, or any other offences from which the benefit of the clergy is taken, and only in smaller matters, as *petty larceny*, and such, to bind over to the Sessions; but this is but in point of discretion and convenience, not because they have not jurisdiction of the crimes.\*

By the stat. of Edw. 3, c. 1, and also by *Trespasses*, the express words of their commission, Justices of the Peace may hear and determine all, and all manner of, *trespasses*.

This is a word of very general extent, and in a large sense not only comprehends all inferior offences, which are properly and directly against the Peace, as assaults and batteries, and the like, but also all others which are so only by construction, as all breaches of the law in general are said to be.†

Yet, like perjury and forgery at common law, any offences which do not directly tend to cause a *personal* wrong, or *open violence*, are not cognizable by them, unless it be by the express words of their commission, or some statute.‡

\* *Ibid*—Prac. Expos. *Title, PEACE, JUSTICES OF*, Sect. 1.

† *Ibid.*      ‡ *Salk. 406.*

Barraty, ex- Barretry, extortion at common law, forestalling, tortion, fore-stalling, lewd and engrossing, lewdness, libels, the whole system, libels, tem of the highway, and poor-laws, are among, highways, & poor-laws. the subjects most commonly cognizable by a Court of Quarter Session.

**Assembling of the court.** The Court being assembled, (which must be before twelve of the clock at noon of the day for which it has been summoned, in order that such persons who have to take the Oaths of Office, of Supremacy, Abjuration, &c. may comply with the statutes which enjoin them,) the usual course is first to proclaim the Session, which is done by a Bailiff of the Court in the following form :

Proclama-  
tion.

*“ O yez, O yez, O yez,—The King’s Justices do strictly charge and command all manner of persons to keep silence, while the King’s Commission of the Peace for this County of —— is openly read, upon pain of imprisonment.”*

Statutes to  
be read.

Then the commission, the King’s proclamation against profaneness, &c. and the several statutes which are severally directed to be read at the Sessions, ought so to be by the clerks of the peace, and town clerks respectively, in an audible voice. These are principally the following :—5 Eliz. c. 1, against popery ; 30 Car. 2, c. 3, as to burying in woollen ; 11 and 12 Will. 3, c. 15, as to ale measures ; 1 Geo. 1, c. 5. as to riots ; and the black act, 9 Geo. 1,

c. 22, which are required to be given in charge at every Quarter Session ; and the 4 & 5 Wil. & Mar. c. 24. 7 & 8 Will. 3, c. 32. 3 & 4 Ann. c. 18, and 3 Geo. 2, c. 25, concerning jurors, which are to be read in Midsummer Sessions yearly ; and 2 Geo. 2, c. 24, for preventing bribery and corruption in the election of members of parliament, which is to be read at every Easter Session.

Some of these are become nearly obsolete, <sup>Fallen into disuse.</sup> others in effect superseded, and a reasonable apology may be made for the general disuse into which the practice of reading others of them is fallen, from the notoriety which is attached to many of them that are still in full force, as well as from the pressure of business which is of late prodigiously augmented, by recent statutes having thrown such a variety of additional burdens on Justices, both in, and out of, Sessions.

The persons who attend to take the several <sup>Oaths to be taken.</sup> oaths are next called, and such oaths are administered to them by the clerk of the peace.\*

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\* Persons qualifying for offices are directed to take the oaths between the hours of *nine and twelve* in the forenoon, *and not otherwise* ; 25 Car. 2, c. 2.—1 Geo. 1. St. c. 13. But the oaths of allegiance, supremacy, &c. may be taken between the hours of one and two ; it has been held a sufficient compliance with the statute however, if the ceremony of administering the oaths of qualification for offices be *commenced* previous to the first hour of limitation appointed by the statute, and continued till all are sworn.

Those of allegiance, supremacy, &c. themselves have been already given in a former chapter, and require no repetition; but it is necessary to notice two statutes passed in this King's reign, relative to the oaths to be taken by persons dissenting from the established church. The former of these relates to papists, who laboured under various disabilities, and were liable to numerous penalties, by previous statutes, but were relieved by the 31st. of Geo. 3, c. 32, on taking the oath therein prescribed as follows.\*

“It shall be lawful for persons professing the Roman catholic religion, personally to appear in the Court of Chancery, King's Bench, Common Pleas, or Exchequer, at Westminster, or in any Court of General Quarter Session of, and for, the country, city, or place where such person shall reside, and there in open Court, take, make, and subscribe the declaration and oath.”

Papists' oath.

“I, A. B. do hereby declare, that I do profess the Roman catholic religion.

“I, A. B. do sincerely promise and swear “that I will be faithful, and bear true allegiance to his Majesty King George the Third, “and him will defend, to the utmost of my “power, against all conspiracies and attempts

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\* This oath is directed to be taken between nine in the morning and two in the afternoon.

“ whatever that shall be made against this person,  
“ crown, or dignity ; and I will do my utmost  
“ endeavour to disclose and make known to  
“ his Majesty, his heirs and successors, all  
“ treasons and traiterous conspiracies which  
“ may be formed against him or them ; and I  
“ do faithfully promise to maintain, support,  
“ and defend, to the utmost of my power, the  
“ succession of the crown, which succession  
“ by an Act, entitled, ‘ an Act for the further  
“ limitation of the crown, and better securing  
“ the rights and liberties of the subject,’ is  
“ and stands limited to, the Princess Sophia,  
“ electress and duchess dowager of Hanover,  
“ and the heirs of her body, being protestants ;  
“ hereby utterly renouncing and abjuring any  
“ obedience or allegiance unto any other person  
“ claiming, or pretending a right to, the crown  
“ of these realms ; and I do swear that I do reject  
“ and detest as an unchristian and impious posi-  
“ tion, that it is lawful to murder or destroy any  
“ person or persons whatsoever, for or under the  
“ pretence of, their being heretics or infidels ; and  
“ also that unchristian and impious principle, that  
“ faith is not to be kept with heretics or infidels ;  
“ and I further declare, that it is not an article  
“ of my faith, and that I do renounce, reject,  
“ and abjure the opinion that princes excom-  
“ municated by the Pope and Council, or any  
“ authority of the See of Rome, or by any au-  
“ thority whatsoever, may be deposed or mur-

" dered by their subjects, or any person what-  
 " soever; and I do promise that I will not  
 " hold, maintain, or abet, such opinion, or any  
 " other opinions contrary to what is expressed  
 " in this declaration; and I do declare that I  
 " do not believe, that the Pope of Rome, or any  
 " other foreign prince, prelate, state, or poten-  
 " tate, hath, or ought to have, any temporal or  
 " civil jurisdiction, power, superiority, or pre-  
 " eminence, directly or indirectly, within this  
 " realm; and I do solemnly in the presence  
 " of God, profess, testify, and declare, that I  
 " do make this declaration, and every part  
 " thereof, in the plain and ordinary sense of the  
 " words of this oath, without any evasion, equi-  
 " vocation, or mental reservation whatever,  
 " and without any dispensation already granted  
 " by the Pope, or any authority of the See of  
 " Rome, or any person whatever; and without  
 " thinking that I am, or can be, acquitted before  
 " God or man, or absolved of this declaration,  
 " or any part thereof, although the Pope or any  
 " other person, or authority whatsoever, shall  
 " dispense with or annul the same, or declare  
 " that it was null or void."

" So help me God."

Oath to be  
made a re-  
cord.

Which said declaration and oath shall be  
subscribed by the person taking and making  
the same *with the name at length*, if such per-  
son can write, or with his mark, the name be-  
ing written by the officer, where such person

cannot write, such person, or officer, as the case is, adding the title, addition, and place of abode of such person, and the same shall remain in such court of record.

And the proper officer of such court with <sup>Certificate  
good evi-  
dence.</sup> whom the custody of such record shall remain, shall make, subscribe, and deliver a certificate of such declaration and oath having been duly made and subscribed, to the person who shall have made and subscribed the same, if demanded, for which certificate there shall be paid no greater fee than 2s. and such certificate, upon proof of the certifier's hand, and that he acted as such officer, shall be competent evidence of such person's having duly made and subscribed such declaration and oath, unless the same shall be falsified.

The other statute, to which allusion was <sup>Protestant  
Dissenters.</sup> lately made, is the 52d Geo. 3, c. 155, and was made for the protection of *protestant dissenters*; the former statutes for that purpose,\* not having been considered as sufficiently explicit, and, indeed, having given occasion to much controversy, and to what the Court of B. R. considered as misinterpretation.† By the last mentioned statute it is enacted that "No congregation or assembly for religious worship of protestants <sup>Places of  
worship of  
Protestant  
Dissenters.</sup>

\* 1 Wm. c. 18 and 19 Geo. 3, c. 44.

† See Pract. Expos. Title, **DISSENTERS**, sect. 2.

(at which there shall be present more than twenty persons, beside the immediate family and servants of the person in whose house, or upon whose premises, such meeting shall be had) shall be permitted unless and until the place of such meeting, if the same shall not have been registered under any former act, shall have been certified to the bishop of the diocese, or archdeacon, or to the Justices at the General or Quarter Sessions; and

To be certified by the Sessions or others. all places of meeting so certified by the bishop or archdeacon's court, shall be returned by such

To be returned annually to, or by Quarter Sessions. and all places of meeting certified to the Quarter Sessions shall be returned once in each

year to the bishop or archdeacon: and the bishop, or registrar, or clerk of the peace, shall give a certificate thereof to such persons as shall demand the same, on payment of 2s. 6d. &c. &c.'

Exemption from penalties.

Justice may require dissenting ministers, &c. to take the oaths.

These requisites respecting the *house of meeting*, having been complied with, the statute goes on to declare that, "all *teachers* and *preachers*, and persons resorting to any place of worship thus certified, shall be exempt from all penalties under statutes relative to religious worship, on condition of taking the oaths prescribed by 19 Geo. 3, c. 44, when thereunto required by any Justice of the Peace of which taking of the said oaths, the said Justice shall give a certificate according to

a form therein prescribed, which certificate shall be conclusive evidence ; and any person may require a Justice of the Peace to administer the said oaths." So that, as the law stands now, all doubts respecting the discretionary power of Justices in Session to judge of the qualifications of persons offering to take the oaths, and to accept, or reject, them, appear to be done away.\*

The ceremony of administering the oaths being concluded, it is usual, in the next place, for the Clerk of the Peace to call over the Constables of parishes, &c. which is commonly done (with respect to the defaulters on the first call) a second, and even a third time. On Defaulters, their not answering to the name of their respective parishes for which they serve, on the third call, the Court sets a fine upon the defaulters.

Next, the same officer calls over the names of those, who are returned upon the grand inquest, who having taken their places in the box assigned to them, the following oath is administered by the Clerk of the Peace, first to the foreman, thus :—

" You, as foreman of this inquest, shall diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge. The king's counsel,

\* See Pract. Expos. *Title, Dissenters, Sect. 2.*

“ your fellows’, and your own, you shall keep  
 “ secret. You shall present no man for envy,  
 “ hatred, or malice; neither shall you leave  
 “ any man unpresented for fear, favour, or  
 “ affection, or hope of reward; but you shall  
 “ present all things truly as they come to your  
 “ knowledge, according to the best of your  
 “ understanding. So help you God.”

Then the rest of the Grand Jury, by three at a time, in order, are sworn in the following manner:

“ The same oath which your foreman hath  
 “ taken on his part, you, and every of you,  
 “ shall well and truly observe and keep on  
 “ your parts. So help you God.”

The Grand Jurors having all been sworn, it is the duty of the Chairman of the Session to deliver his charge to them.\*

Charge to  
the Grand  
Jury.

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\* It is much to be lamented that this part of the Chairman's duty is very frequently altogether omitted, and sometimes performed in a very cursory, and even slovenly, manner. The calendar generally presents sufficient occasion for observations on the general state of morals in the particular district; on the activity of Justices, Chief Constables, and all Officers of the Peace; and on other subjects immediately connected with the duties of the day: and there can be few instances of a Session occur, in which there is not some indictment or other to come before the Jurors, on which some information may not be, at least, convenient and acceptable, if not absolutely necessary. Indictments for assault, which frequently originate in a spirit of party, malice, or revenge, and are usually one item in the business of a Quarter Session, presen-

The charge being concluded, the course is Recognizances called to call the recognizances, especially such as are called to prosecute and give evidence, that so bills may be drawn and prepared.

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a fruitful source of observation ; indictment of roads another ; and some modern statutes (*ex. gr.* those which respect the coin, and embezzlement by servants,) comprehend so many more points of discrimination, as it is no disparagement of the discernment of such persons as usually compose the Grand Juries at Quarter Sessions, to say, must be much above their comprehension, without some explanatory remarks from the Chairman, by way of previous charge.

These observations on the necessity for a charge at all events, naturally lead to some consideration of the sufficiency of the Chairman to discharge this duty, and therefore to introduce a decided reprobation of a measure lately introduced into some counties, of the respective Justices taking the chair by rotation. Nothing can be more subversive of regularity, consistency in practice, expedition in business, information to the Jurors, authority over the advocates, or satisfaction to the country, than such a practice. To execute the various duties of Chairman of a Quarter Session, as they ought to be executed, requires the *personal* qualifications of *some* legal knowledge, reasonable experience, an acquaintance with forms and technical proceedings, and a portion of that decision and authority which can only be acquired by a confidence in the possession of these qualities, to at least a certain degree. Unless the Chairman possess these requisites to some extent, the Jury can receive no information, the Advocates will run riot, and the county will not feel that respect for the court, which it is both desirable and useful that it should do. It leads also to another consequence, which ought neither to be agreeable to himself, or the Bench, or the Suitors of the Session, viz. that the Clerk of the Peace being the only permanent and stationary organ of the Court, instead of its minister, he becomes its master.

The bills being ready, the parties bound to give evidence upon them are sworn, and sent to the Grand Jury to give their evidence to them.\*

Duties of the Grand Jury.

In this stage of the proceedings, a few words on the duty of Grand Juries, which may well make part of the subject of the chairman's charge to them, may not be irrelevant. It has been generally laid down by some of the greatest lawyers, that the Grand Jury ought only to hear the evidence for the king, that is to say, on the side of the prosecution.†

But others have received this position with some qualifications,‡ which indeed it ought to be; for they are sworn to present the truth and nothing but the truth; and it may so happen, that they may not be able to elicit truth from the witnesses on the part of the prosecution only, and they may actually be convinced of that circumstance. The true intention seems to be this, viz. that *prima facie* the Grand Jury have no concern with any testimony but that which is regularly offered to them along with the bill of indictment, on the back of which the names of the witnesses are inserted; their duty being merely to inquire whether there be sufficient apparent ground for putting the ac—

\* Dalt. c. 185.

† 2 Hale's Hist. 157.

‡ 4 Black. Com. 383.

edised party on his trial before another Jury of a different description. If nothing ambiguous or equivocal appear on this testimony, they certainly ought not to seek any further; but if their minds be not satisfied of the truth, so far as is necessary for *their* preliminary kind of inquiry; they are not prohibited from requiring other evidence *in explanation* of mere facts; but they can proceed no further; for that would be to *try*; although *their* duty is confined merely to the question, "whether there be sufficient *pretence* for trial."\*

The Grand Jury are sworn to inquire *pro corpore comitatus*, and therefore, by the common law, cannot regularly indict or present any offence, which does not arise within the county or precinct, for which they are returned.

And therefore it is a good exception to an indictment, that it doth not appear that the offence arose within such county or precinct.

And it seems agreed as a general rule, that let the nature of the offence indicted be what it will, whether local or transitory, as seditious words, battery, &c. if it appear upon plea of not guilty, to have been committed in a different county from that in which the indictment was found, the party shall be acquitted.† The Grand Jury, therefore, cannot regularly inquire

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\* 3 Inst. 25.—See Pract. Expos. *Title, INDICTMENT*, sect. 3.

† 2 Hawk. c. 25.

of a fact done out of the county for which they are sworn, unless particularly enabled by Act of Parliament. Of these there are several, but not relating to offences which usually come before a Court of Quarter Sessions.\*

But it seems by the common law, if a fact done in one county prove a nuisance to another, it may be indicted in either. Also by the common law, if one guilty of larceny in one county carry the goods stolen into another, he may be indicted in either;—because the possession continuing constructively in the party robbed, every moment's continuance of the trespass is as much a wrong as the first taking, and the offence is therefore complete in both.†

Witness  
refusing to  
give evi-  
dence.

If a person whose evidence is material to the finding of a bill of indictment, refuse to go before the Grand Jury to give evidence, the prosecutor may procure a subpoena to compel him thereto.‡

A Grand Jury must find *billa vera* or *ignoramus* for the whole; and if they take upon them to find it specially or conditionally, or to be true for one part only, and not for the rest, the whole is void, and the party cannot be tried upon it, but ought to be indicted anew.

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\* 4 Black. Com. 303.

† 2 Hawk. c. 25.

‡ 6 Term R. 295.

But this rule relates only to cases where the Grand Jury take upon themselves to find part of the same indictment to be true and part false, and do not either affirm or deny the fact submitted to their inquiry ; but where there are two distinct counts, viz. one for riot, and the other for an assault, and the Grand Jury find a true bill as to the assault, and indorse *ignoramus* as to the riot, this finding leaves the indictment, as to the count found, just as if there had been originally only that one count.\*

While the Jury is absent to consider of the Motions bills, the usual way is to hear *motions* touching settlements, bastardy, nuisances, and the like ; and to call persons bound over to the peace, or good behaviour ; but they are not to be discharged before the end of the Session, lest any one should come to prefer bills against them.†

“ Upon appeals to be made to the Session against judgments or orders, the Justices shall cause any defect of form in such original judgments or orders to be rectified and amended, and then shall proceed upon the merits ;”‡ but appeals making a distinct, and important part of this chapter, the consideration of them is postponed for the present. The subjects, therefore, which claim immediate attention

Defects of  
form to be  
amended.

\* Cowp. R. 325.

† Dalt. c. 185.

‡ 5 Geo. 2, c. 19.

are “*motions* touching Bastardy, Nuisances, and the Peace or good behaviour.” These then in their order.

*Motions respecting Bastardy.*—1. **BASTARDY.**—The filiation of Bastards, in the first instance, belonging to Justices *out of* Session, and all questions touching their settlements, appertaining to that portion of this chapter which treats of appeals, all that now presents itself to be discussed, respects the orders to be made for their maintenance, by the Court of Quarter Session.

It being now settled beyond further controversy that Sessions have the power to make original orders of Bastardy, the subject may either come before them on an application after that mode, or by way of appeal from the order of two Justices.\* In either case a few general rules are necessary to be noticed, and some which are common to *both* processes.

*Proceeding before two Justices out of Session.* If the proceedings have been according to the stat. of Elizabeth,† before two Justices out of Session, and be brought before the Court of Quarter Session by appeal, they may not only quash the order of the two Justices, but they may make an original order on another person.‡ But this exercise of original au-

\* See Pract. Expos. *Title BASTARDS*, sect. 3.—1 Bott. 509.—49 Geo. 3, c. 68, by which stat. this power of making original orders is fully recognized.

† 18 Eliz. c. 3.

‡ 2 Bulst. 355.—1 Bott. 607.

thority by Sessions, it seems, must be under such limitations as may give the party who is to be burdened by it, the same opportunity of resisting it, as he would have had (through the medium of a different process) by appeal from the order of two Justices; for it has been decided, that the reputed father shall not, by the proceedings being under the subsequent stat.\* be deprived of all opportunity of resistance to the order. The order therefore cannot be made upon him unless he appear, or at least have been summoned to appear.† If the Justices in Session, therefore, quash the order previously made by two Justices out of Session, and make an original order upon a person who has not been previously charged, if he be not present, they must either respite *their* proceedings to give him an opportunity of appearing at a future time, or the *whole proceeding* must begin *de novo*; for otherwise a party unjustly saddled with a burden by two Justices under the stat. of Eliz. would have the opportunity of discharging himself by appeal against that order; while another similarly burdened by an original order in Session, would be deprived of all relief; no appeal lying *ab eodem ad eundem*, or from one authority to another with powers exactly similar.‡

Father must  
be summon-  
ed.

No appeal  
ab eodem ad  
eundem.

\* 3 Car. 2, c. 4. † 1 Str. 575. 1 Bott. 508.

‡ 1 Sess. Ca. 179. 1 Bott. 486.

Non-appear- But if the party being summoned do not  
ance taken appear, the charge may be taken *pro confesso*  
for confes-  
sion. and the Justices proceed.\*

Sessions But although Sessions may make an ori-  
cannot re- ginal order, they have no power by the stat-  
quire secu- tory for per- to make the father give security for the per-  
rity of per- formance of formance of that order, as the single Jus-  
order. tice has, before whom, the subject must have

come in the first instance.† And if the Jus-  
tices in Session do so far exceed their autho-  
rity as to make the order of filiation, *and also*  
*one* for the performance, the court of B. R. will  
confirm the former, and quash the latter.‡

No limita- No time is limited for these orders either  
tion of time. by two Justices, or by the Quarter Sessions;  
but if the putative father; against whom the  
examining Justice granted his warrant in the  
first instance,§ run away to avoid it, and return  
at any distant period, and be taken, the order of  
filiation may then be made.||

No order But if the reputed father had been sent to  
made in six prison for not finding sureties, and no order  
weeks after birth, and was made upon him in six weeks after the  
father in birth of the child, he would be entitled to be  
prison. liberated, under the words of the stat.¶ Bu-

\* 2 Sess. Ca. 192. 1 Bott. 482.

† 6 Term R. 147.—See Pract. Expos. *Title, BASTARD*  
Sect. 3, notes.

‡ Ibid. § 6 Geo. 2, c. 31.

|| 1 Sess. Ca. 77.—1 Bott. 473.

¶ 6 Geo. 2, c. 31. S. 3.

nevertheless, an order made upon him *subsequently* would be good, for the reasons before given.

And if the mother die, or be married before her being delivered of the child, or she appear not to have been with child, the father is entitled, by the stat. last referred to, to be released out of custody by one Justice, and discharged from his recognizance by the next Session.\*

And if the mother die immediately after delivery, and before any order of maintenance can have been made, her previous examination before the Justice will be sufficient evidence to proceed upon in making an order of filiation; for, as was said by Lord Kenyon, in a case of this kind (the other Judges concurring) "There is no doubt but that they may proceed to make the order, 'although the woman be dead; the examination having been taken before a Magistrate in the course of a judicial proceeding under 6 Geo. 2, c. 31, is certainly admissible evidence, and being admissible, and not contradicted by any other evidence, it seems to be conclusive.'†

If two Justices make an order, and the party appeal to the Session, the order of such Session upon the *merits* will be final,

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\* Id. S. 2. † 5 Term R. 372.

and no subsequent Session can controvert it.\*

**Upon form only.** But if such Session quash it for want of *form* only, it is no order at-all; and the matter may be proceeded on *de novo*, or the Session may amend in point of form, and then proceed upon the merits.†

**Effect of acquittal upon merits.** And if the Session quash the order of Justices upon the *merits*, the defendant is thereby acquitted of the fact altogether.‡

**Recent alteration, by stat. 49; Geo. 3.** But now, by a recent statute,§ no inconsiderable alteration having been made in all the proceedings, as well those before the examining Justice, as by Sessions, the *consequences* are, of course, subject to variation, and the provisions of the statute itself are open to observation.

**Recital.** It first recites that the provisions of 18 Eliz. are inadequate to the purpose of *indemnifying parishes* against the charges incurred in apprehending the reputed father, and obtaining the order of filiation, and then enacts, that in whatever way the adjudication be made, whether according to the stat. of Eliz. by two Justices, or according to the stat. of Charles, by the Court of Quarter Session, that the reputed father of a bastard child

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\* Bulst. 255. 1 Bott. 506.

† 5 Geo. 2, c. 19.

‡ 2 Str. 716. 1 Bott. 511.

§ 49 Geo. 3, c. 68.

shall be chargeable not only with the ex-<sup>Incidental</sup> pences incidental to the birth, but with those of his own apprehension, and those incurred by the ~~filiation~~, not exceeding in the whole the sum of ten pounds, to be ascertained by oath before the Justices in, or out of, Session, making the order. s. 1.

It then proceeds to give the like powers, as had been previously given by the former statutes, to Justices, to grant their warrants for the apprehension of reputed fathers, to compel them to give security for the indemnifying of their respective parishes, or to abide the order of Session, but with this addition; viz. "unless one such Justice shall certify in writing to such Session, that it had been proved before him upon the oath of one credible witness, that such woman had not been delivered, or had been delivered within one month previous to the day of the Session; or, unless two Justices of the county, &c. shall certify in writing to the Session, that an order of filiation had been already made on the person charged; or, of the child being dead, or other like sufficient reason why such order is not requisite to be made. In each of which cases *firstly* before mentioned, it shall be lawful for the Justices assembled at such General Quarter Sessions or General Sessions of the Peace, to respite such recognizance to the then next General Quarter Sessions

Certificate  
that women  
is not deli-  
vered, or not  
delivered a  
month, or  
an order has  
been made.

or General Sessions of the Peace, to be holden for such county, riding, division, city, or town corporate, without requiring the personal attendance of the putative father so bound, or of that of his surety or sureties, and in either of the said two *last*-mentioned cases, it shall be lawful for the Justices assembled as aforesaid, wholly to discharge such cognizance," s. 2.

~~Summary. Having thus provided, then, for the additional indemnity of the parish, against the *in*-  
remedy for  
performance of the order  
of the order  
maintenance~~ *cidental*, as well as the *principal*, expences, as also for the liberty of the reputed father in those cases where his appearance before the Session is unnecessary, it proceeds to provide a new and summary remedy for the performance of the order, when actually made, as follows:

~~Recogni-  
zance in cer-  
tain circum-  
stances to  
be discharg-  
ed.~~ " If any reputed father or any mother of any such bastard child, on whom any order of filiation or maintenance of any such child shall have been made by the Court of Quarter Sessions, or which shall have been made by two Justices, confirmed by the Court of Quarter Sessions, shall neglect or refuse to pay any sum of money which he or she shall have been ordered to pay towards the maintenance or other sustentation for the relief of any such bastard child, by any such order, it shall be lawful for any Justice of the county, riding, division, city, liberty, or town cor-

porate, in which such reputed father or such mother shall happen to be, and he is required upon the complaint made to him by one of the overseers of the poor of any parish, township, or place liable to the maintenance or support of such bastard child, or where such bastard child or children shall then be, and upon proof on oath of such order for the payment of such sum of money, and of such sum of money being unpaid, and of a demand of such payment having been made and a refusal to pay the same, or that such reputed father or such mother, hath left his or her usual place of abode, and hath avoided a demand thereof being made by such overseer, to issue his warrant to apprehend such reputed father or such mother, and to bring him or her before such Justice, or any other Justice of the same county, &c. to answer such complaint; and if such reputed father or such mother shall not pay such sum of money, as shall appear to the said Justice, before whom such reputed father or such mother shall be brought, to be due and unpaid, or shall not shew to such Justice some reasonable and sufficient cause for not so doing, it shall be lawful for such Justice, and he is required to commit such reputed father or such mother to the public house of correction, or common gaol of the said county, to be there kept to hard labour for the space of three months, un-

less such reputed father, or such mother, shall, before the expiration of the said three months, pay or cause to be paid to one of the overseers of the poor of the parish, township, or place, on whose behalf such complaint as aforesaid was made, the said sum of money so due and unpaid as aforesaid, and so from time to time, and as often as such reputed father or such mother shall, in manner aforesaid, neglect or refuse to pay any other sum of money that shall afterwards become due by virtue of, and under, such order, after the expiration of, or discharge from, any such former imprisonment as aforesaid."

s. 3.\*

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\* It has been contended, and, indeed, within the Author's knowledge, admitted in practice, that as this stat. peremptorily directs the commitment of the father by the warrant of a Justice for his disobedience of the order, and that too *toties quoties*, the penalty is thereby complete, and the sureties absolved. If it be so, the statute so far from having been made, as it is recited, for the further indemnification of parishes, places them, in certain points, in a worse situation than they were under the former statutes, by exonerating the sureties in consequence of the personal punishment of the father. The statute appears to have had, in this particular section, two objects in view.—*First*, to give the Justices a power of indemnifying the onerated parish against certain expences, beyond the mere *accouchement* of the mother, and the maintenance of the child, which they had not by any anterior authority; *secondly*, to provide a summary remedy for the punishment of the offender, instead of the former circuitous one by indictment for disobedience.

The statute, then, provides that, “ all such Powers of charges, expences, and costs, shall be wholly sub-<sup>18 Eliz. ex-</sup> tended to subject to the discretion of the Justices, or Court this act. of Quarter Session; who shall make out such order of filiation ; and the Justices or Court of Quarter Session are authorized, if they shall see fit, to allow, and order payment of, the whole or any part thereof ; provided that the costs of apprehending and securing the reputed father, and of the order of filiation, shall not in any case exceed the sum of ten pounds ; and for securing the due payment of the same, after such allowance and order as aforesaid, *all the powers and authorities contained in the said act passed in the eighteenth year of the reign of Queen Elizabeth, concerning bastards, shall be observed, used, and practised in the execution of this act.*” s. 4.\*

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The *sureties* are not so much as mentioned, or alluded to, and therefore it should seem were designed to be left in precisely the same situation as the former stat. of Eliz. had placed them, intending to make no alteration but what is favorable to the interests of the parish, both with respect to pecuniary indemnity, and compendious prosecution. If the construction above introduced prevail, the statute, instead of being one for the further indemnity of parishes, and the punishment of fathers of bastard children, may, more appropriately be entitled an “ *Act for the indemnity of sureties, and the punishment of parishes!*”

\* It may be worthy considering how far these words misstate against the construction adverted to in the note upon the preceding section, for one of the provisions of the stat. of Eliz.

"An appeal is then given to the Sessions, from the order of two Justices, where the parties complaining shall have originally proceeded according to that mode, in the following words:

Appeal. "Any person who shall think himself aggrieved by any order made by such Justices, under the provisions of this act, and not originating in the Quarter Session, may appeal to the next General Quarter Session of the Peace, to be holden for the county where such order shall be made, *on giving notice to such Justices, or to one of them, and also to the churchwardens and overseers of the poor of the parish, on whose behalf such order shall have been made, or to one of them, ten elvy days before such General Quarter Session of the Peace, at which such appeal shall be made, of his intention of bringing such appeal, and of the cause and matter thereof, and entering into a recognizance within three days after such notice, before some Justice for such county, with sufficient surety conditioned to try such appeal, and abide the judgment and order of, and pay such costs as shall be awarded by, the Justices at such Quarter Session, which said Justices, at their said Session, upon proof of such notice being given, and of entering into such recognizances as aforesaid, shall, and they are required to proceed in, hear, and deter-*

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*is that "the sureties shall be liable for the performance of the order."*

mine the causes and matters of all such appeals, and shall give such relief and costs to the parties appealing, or appealed against, as they in their discretion shall judge proper ; and such judgments and orders therein made, shall be final, and conclusive to all parties concerned. s. 5.

After the passing of this act, no appeal in any case relating to bastardy, shall be brought, received, or heard at the said Quarter Sessions, unless such notice shall have been given, and such recognizance shall have been entered into in manner aforesaid according to the provisions of this act. s. 7."

It may be useful here to notice the general Grounds of ground, on which resistance to the order of Justices, by way of appeal, or even to original orders of Sessions, must generally, from the nature of the subject, be grounded. The mother of the bastard being the only person who can be in complete possession of ~~all~~ the circumstances relative to her connections with the other sex, her declaration on oath with respect to the father of her child, must of course be deemed conclusive, unless it be rebutted by some legal inference, or by such other testimony as shews that she must necessarily either have been in an error, or have sworn a falsehood; which, generally speaking, can only be done by proof of non-access within time, which would shew her *at least* in an error; or by other proof sufficient to throw an entire dis-

credit upon her testimony in the particular case, which would tend to prove her guilty of, wilfull falsehood.

It would carry us beyond all reasonable bounds, to put every possible way, in which the charge of bastardy may be proved, or resisted. A few general rules are all that can be resorted to, conformably with our design. If the person charged as the father be an eunuch,\* under puberty,† or absent too long to have possibly had access within the period necessary for gestation,‡ he *cannot* be the father of the child. A married, as well as a single woman, may have a bastard child, and these rules apply to both; for a married woman may have a child within the description of a bastard by the stat. if non-access of her husband within the limits of natural gestation be proved. The *proof* is the only question of difficulty for the Court of Quarter Session.

Mother of a bastard can only be admitted to prove her own incontinence. It has been repeatedly determined that the wife can be a witness to *no fact whatever*, but of incontinence, and *that ex necessitate rei*; but that non-access, and every other fact which may be disputed, *must be proved* by other witnesses, if proved at all. This is a rule of universal application, to whatever point in the

\* 4 Vin. 215, 8yo. edit.

† Just 244.—2 Str. 940.

‡ 2 Str. 925, 1076.—Pract. Expos. Title, BASTARDY, Sect. I.

particular case it tend, and whomsoever it is to charge, or to exonerate.\* Having stated *how* proof of non-access is to be given, it is necessary next to shew *what* is considered as proof itself of non-access. Actual absence of the husband beyond sea was formerly considered as the criterion with respect to a married woman; but that rule has been considerably relaxed of late years.† The last case on the subject lays it down as follows; “Where a child is born in lawful wedlock, the husband not being separated by divorce, sexual intercourse is presumed, *till* that presumption is encountered by *such evidence* as proves, to the satisfaction of *those who are to decide the question*, that it did not take place, when by the laws of nature the husband *could be* the father of the child. By the term *access*, must be understood *sexual intercourse*, for otherwise a husband might be said to have access because he was in the same place with his wife, although under circumstances which tended to prove that *no sexual intercourse could take place*.†‡ Thus much is sufficient to observe respecting the testimony of the mother of a bastard child, where perjury in her makes no part of the reputed father’s

\* 2 Sess. Ca. 175.—6 Term R. 330.—8 East's R. 193.

† 2 Str. 925.

‡ By Mansfield C. J. C. B. In the case of the Banbury Peerage, House of Lords, in 1811.

case, in resistance of the charge, and the consequent order of Justices; where the resistance to the order depends on merely impeaching the veracity of the mother, the task of doing so can only be exercised within a small circle, and generally must consist in *proving*, that she has made declarations in an early state of pregnancy incompatible with the charge under investigation; or that she has been influenced by bribery alone to charge one person, or to acquit another; or, in general terms, such irrefragable testimony of a false and unfounded charge as leaves no room for doubt. These, and such like conclusions are usually to be elicited only from the mother herself by a cross examination.

Order of proceeding in appeals.

The last subject relative to appeals before the Court of Quarter Session, is the mere technical order of proceeding, which is, that upon an appeal against an order of filiation of two Justices, the respondent ought to *begin*, that is, ought to commence the controversy, by supporting the order; and *that* too whatever may have been the practice of any particular court.\*

Parents leaving bastard children.

The order having been made by two Justices, and either being confirmed, or unappealed from; or having been duly made by the Justices in Session; it remains only to notice the case of the parents' leaving their bastard

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\* 12 East's R. 50.

children chargeable to their respective parishes, having property by which means such parishes might be indemnified. And it is provided that "as the putative fathers, and lewd mothers of bastard children run away out of the parish, and sometimes out of the county, and leave the said bastard children upon the charge of the parish where they were born, although such putative father or mother have estates sufficient to discharge such parish ; it shall be lawful for the church-wardens and overseers of the poor of such parish, where any bastard child shall be born, to take and seize so much of the goods, and receive so much of the annual rents or profits of the lands, of such putative father or lewd mother, as shall be ordered by any two Justices toward the discharge of the parish, to be confirmed at the Sessions, for the bringing up and providing for such bastard child ; and thereupon the Sessions may make an order for the church-wardens or overseers of the poor of such parish, to dispose of the goods by sale or otherwise, or so much of them for the purposes aforesaid, as the court shall think fit, and to receive the rents and profits of the lands, or so much of them as shall be ordered by the Sessions."\*

Under this statute an order which was made by the Justices, that the churchwardens and

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\* 13 and 14 Car. 2, c. 12.

overseers of the poor should seize of the defendant's goods *what they might judge proper*, to secure the parish from the maintenance of his bastard child, was moved to be quashed, because, by the act they have only authority to make an order to empower the churchwardens and overseers to seize *what the Justices shall judge proper*; and not what the churchwardens may judge proper; and for this reason it was quashed.\*

*Form of the Warrant, for Confirmation, by the Justices in Session.*

County of { " To the Churchwardens and  
Overseers of the parish of \_\_\_\_\_  
in the County of \_\_\_\_\_

" Whereas A. B. and C. D. churchwardens,  
" and E. F. and F. G. overseers of the poor of  
" the said parish of \_\_\_\_\_, have made com-  
" plaint unto us P. Q. and S. T. esquires, two  
" of his Majesty's Justices of the Peace in and  
" for the said county of \_\_\_\_\_, one whereof is  
" of the Quorum, that R. R. late of the said  
" parish of \_\_\_\_\_, hath run away out of the  
" said parish of \_\_\_\_\_, and that the place of  
" his abode cannot be discovered; and that the  
" said R. R. hath left his male bastard child,  
" aged three years, and born within the said  
" parish of \_\_\_\_\_, upon the charge of the said

\* 2 Lord Raym. 858.

" parish of ——, although he, the said R. R.  
" hath an estate consisting of ten acres of  
" land, [or as the case is], situate at ——, suffi-  
" cient to discharge such parish from the charge  
" of such male bastard child; and whereas we,  
" the said Justices have duly examined into  
" the cause and circumstances of the said com-  
" plaint, as well upon oath as otherwise, and  
" it doth appear unto us, and we do adjudge,  
" that the said complaint is true; and we do  
" also adjudge him, the said R. R. to be the  
" reputed father of the said bastard child.—  
" These are therefore to authorise you, the said  
" church-wardens and overseers of the poor of  
" the said parish of ——, to take and seize so  
" much of the goods and chattels, and to  
" receive so much of the annual rents and  
" profits of the said lands, of the said R. R.  
" situate at —— aforesaid, as shall amount  
" to, or be sufficient to raise and pay, the sum  
" of ——, which we do hereby appoint and  
" order you to receive, towards, the discharge  
" of the said parish, and for the bringing up  
" and providing for the said bastard child:  
" and you are hereby required to attend at the  
" next General Quarter Session of the Peace  
" to be holden in and for the said county of  
" ——, in order that this present order may  
" be then and there confirmed, according to  
" the statute in that behalf made and pro-  
" vided."

Nuisances. 2. **NUISANCES.**—Under this division we are not about to consider the *indictment and trial* of nuisances, for those are matters which belong to another portion of this chapter; nor the *abatement* of Nuisances, for that must be pre-supposed, before any thing respecting them can come before the court by way of motion; nor *actions* on account of damage sustained by nuisances, for that would be beside our purpose; but merely presentments of certain Nuisances by Justices, without the intervention of a Grand Jury; and motions by advocates which are confined to the respite of proceedings on indictments and presentments; or to the imposition of a fine after conviction, or confession, or abatement.

*The Form of a Presentment of a Justice of the Peace.*

“——. At the General Quarter Session  
“of the Peace of our Lord the King, held for  
“the said county at —— in the said county,  
“on (Tuesday) the —— day of —— in  
“the said year of the reign of ——, before  
“—— esqrs. and others their companions,  
“Justices of our said Lord the King, assigned  
“to keep the peace in the said county, and also  
“to hear and determine divers felonies, tres-  
“passes, and other misdemeanours in the said  
“county committed: A. B. esq. one of the  
“Justices of our said Lord the King, assigned  
“for the purpose aforesaid, by virtue of an act

made in the thirteenth year of the reign of his Majesty King George the Third, ' for the amendment and preservation of the highways,' (upona his own view), or (upon information, upon oath, to him given by C. D. surveyor of the highways for the (*parish, &c.*) of —— in the said county,) doth present, that from the time wherenof the memory of man is not to the contrary, there was, and yet is, a certain common and ancient king's highway leading from the town of —— in the said (*county, &c.*) towards and unto —— within the same (*county*) used for all the king's subjects, with their horses, coaches, carts and carriages, to go, return, and pass, at their will: and that a certain part of the same king's common highway, commonly called —— situate, lying, and being in the (*parish, &c.*) of —— in the same (*county*) containing in length —— yards, and in breadth —— feet, on the —— day of —— in the —— year of the reign of ——, and continually afterwards until the present day, was, and yet is, very ruinous, deep, broken, and in great decay, for want of due reparation and amendment, so that the subjects of the king through the same way, with their horses, coaches, carts and carriages, could not, during the time aforesaid, nor yet can, go, return, or pass, as they ought and were wont to do, to

“ the great damage and common nuisance of  
 “ all the King’s subjects through the same  
 “ highway, going, returning, or passing, and  
 “ against the peace of our said Lord the King,  
 “ and that the inhabitants of the (parish, &c.)  
 “ of —— aforesaid in the (county) aforesaid,  
 “ the said common highway (so in decay) ought  
 “ to repair and amend, when, and so often as  
 “ it shall be necessary...

“ In testimony whereof, the said A. B. to  
 “ these presents hath set his hand and seal the  
 “ —— day of —— in the year aforesaid.”

The indictments or presentments, which commonly produce motions for respiting the proceedings, being for obstructions on, or the non-repair of, highways; it is usual to grant respite after respite, on motion, in order to give the persons prosecuted time to remedy the evil complained of; the reason and occasion for these, and such like indictments or presentments, being much less for the purpose of punishing the offenders, than of abating the nuisance.

If, after the bill be found by the Grand Jury, the parties prosecuted continue obstinate, the proceedings are continued, as on other offences of which the Sessions have cognizance, to conviction and judgment; but in those instances where the intended purpose is effected by the removal of the obstruction or encroachment, as the case may be, or by the repair of the highway itself, the regular course is to present

Respiting  
the proceed-  
ings.

a certificate to the Sessions, on motion, setting forth that the object of the indictment or presentment has been accomplished. Many considerations enter into the subject of these certificates, as they affect the duty of the Justices in Session. After first observing, that giving a false certificate is an indictable offence,\* it is necessary to see how, and by whom, they are to be given. The great object is to convince the court that the purpose of the prosecution has been obtained, and no specific rule is laid down by what medium that shall be accomplished.

It has long been the practice for two neighbouring Justices to take a personal view, and <sup>view by Justices.</sup> grant a certificate thereon, and this may be the better method; but there seems no reason why the court may not, when this method is found impracticable or inconvenient, be satisfied by other evidence. In the latter case, however, <sup>By other persons.</sup> it is an universal rule, that if the testimony of persons, not being Justices for the district or division, be accepted, that they shall be present in person, in order to be subject to cross examination, and that they shall be upon oath.†

It is no excuse for the inhabitants of a parish being indicted at common law, that they have <sup>Certificate to be ample.</sup> done all that is required *by statute*; for the statutes are only in *affirmance and aid* of the

\* 6 Term. R. 619.

† Ibid.

commou law ; and therefore it follows that the certificate of repair must be governed by the same consideration, and be ample as to the state of repair.\* Nor shall the defendants be discharged by submitting to a fine, for a ~~det~~ *stringos* shall go *ad infinitum* till they sufficiently repair.†

And repair  
complete.  
Peace.

3. THE PEACE OR GOOD-BEHAVIOUR.—It has been contended that a recognizance taken by a single Justice to keep the peace, or be of good behaviour, for any certain period, or for life, or without expressing any specific time, and without fixing any certain period for the offender's appearance, and without binding him to keep the peace to all the King's subjects in general, as well as to the person making the complaint, is legal and sufficient ;‡ and in former times, such appears to have been a common practice ; but it has of late been the more usual, and considered as the better way, to bind the party, against whom the peace is required, to appear at the next Session of the Peace, and in the mean time to keep the peace to the King and all his liege people, especially to the party claiming the security ; and though the recognizance for keeping the peace should be removed by *certiorari*, it is no discharge of the obligation to appear.§

\* 1 Hawk. c. 76.

‡ Ibid.

† 1 Hawk. c. 60.

§ 2 Hawk. c. 27.

This is, according to the style of all the modern precedents, and seems founded in justice and propriety, notwithstanding the objection that has been urged against it.\*

The person bound then being now called Discharge upon his recognizance before the Justices in Session,—the Court may make proclamation, by Procla- that “if any man can show cause why the man granted against *such a one* shall be condemned, he shall speak;” and if no person come to demand the peace against him, or to shew cause why it should be continued, then the court may discharge him,†

But if a man be bound as aforesaid, and especially to keep the peace towards a certain person, then, though such person come not to desire the peace may be continued, yet the

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\* It has been said, that, if the offender be a dangerous person, the binding him only to the next Session, is insufficient security; and if he be then called upon anew to give a security for further keeping the peace on account of the original offence, it is punishing a person twice for one offence. First, it may be answered, that finding sureties of the peace, is merely a proceeding of precaution against the *future*, and not a punishment for the *past*, although it be true that breaches already committed, form the ground of apprehension for the *future*. Secondly, even if it be taken in the light of a punishment, it is likely rather to be diminished than augmented by this practice; because it gives the prosecutor the option of being satisfied with a security of shorter duration than would otherwise have been required.

† *Deut.* 120.

Court by their discretion may bind him over till the next Session, and that may be to keep the peace against that person only, if they shall think good; for it may be, that the person who first craved the peace is sick, or otherwise prevented, so as he cannot come to that Session to demand the continuance of the peace further.

Farther  
binding by  
exhibition  
of articles.

If he appear, however, he may there move the Court to receive articles of the peace against the offender, (with which articles, ready drawn on parchment, he should come prepared, in order that they may be delivered to the Clerk of the Peace) and further to bind him by recognizance to the next Session;— and so on from Session to Session, so long as he shall be able to make it appear his apprehensions continue. And here let it be observed, that a party requiring surety of the peace (whether it be in the first instance before a single Justice for immediate security, or by exhibiting articles before the Justices in Session,

Swears only on account of continued apprehension) swears only to his own fears, of which no other person can be an adequate judge; from which it has been deduced by the judges, in many cases, as a general rule, that articles of the peace cannot be resisted on any ground, except by shewing *direct* evidence of express malice; such as declarations to that effect; but not *inferred* malice, collected from general reasoning or collateral circumstances; and moreover, that where-

ever particular facts of violence are stated by the complainant, it is not permitted for the defendant to controvert them; for they must be taken to be true, till negatived through the medium of an appropriate prosecution.\*

And the practice of Courts of Quarter Ses. Practice of Sessions as to continuance of binding.  
tions is to continue a recognizance for keeping the peace, from Session to Session, until it be discharged.†

That of the Court of King's Bench is to continue the person bound to keep the peace upon his recognizance for twelve months; and if no indictment be in the interim preferred against him, to discharge it at the expiration of that time.‡

This seems likewise to be the practice of the Of R. B. & Court of Chancery; for upon a motion to discharge a writ of *supplicavit*, it was said by Lord Macclesfield chancellor, "the application is too early; let the party stay till a year be expired, and in the mean time let him take care to behave peaceably."§

And if a man be bound to the peace during his life (which, as we have already seen, a Justice in his discretion, and upon sufficient

\* 13 East's R. 171.—See the whole doctrine on this subject, much at length.—Pract. Expos. *Title, PEACE, SURETY FOR, sect. 1.*

† 4 Bac. Ab.

‡ 2 Str. 335.

§ 2 Peere Wil. R. 202.

cause, may legally do, or generally without any time or day limited; in such case neither the King, the Justice, the Party, nor the Sessions, can discharge this recognizance during the life of the party so bound, by release or otherwise.\*

~~Now~~ ~~recognizance~~ ~~may be dis-~~ But if the person who has entered into a recognizance for keeping the peace die, the charged. recognizance may be discharged.†

Also the demise of the King is a discharge of a recognizance for keeping the peace; for as the condition is to *keep our peace*, his successor cannot take advantage of a breach.‡

But it seems, according to the better opinion, that a release from the person upon whose complaint it was entered into, is in no case a discharge of a recognizance for keeping the peace; for, as the recognizance was entered into to the King, and not to the subject, it is not in the power of that subject, who is no party to it, to discharge it; however, such a release may be a good inducement to the court, to which such a recognizance shall be certified, to discharge it, if it be within their power.§

Pardon.

After the condition of a recognizance for keeping the peace is broken, the King may pardon the forfeiture; but the King cannot release

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\* Lamb. 113, Dalton, c. 129.

† 1 Hawk. c. 60.

‡ Ibid. § Ibid.

the condition before it is broken; because the person upon whose complaint the recognizance was entered into, has an interest in the condition.\*

The demand of a recognizance for surety of Application for recognizance may the peace has been treated of as being *first* made before a single Justice, and *continued* by be originally articles exhibited before the Justices in Session: to the Justices in Session. It must not be understood, however, to come before the latter in the manner of an appeal from the former, for there is no reason whatever, why an original application should not be made to the Justices in Session, if the party complaining consider such application sufficiently early for his protection. In that case, a warrant must of course proceed from the bench, against the offender; but the recognizances, both for the immediate preservation of the peace, and for his future appearance at the next Session, may be But may be taken before a single Justice, if not apprehended taken before a single Justice before the adjournment, or termination, of the court.

If the warrant for apprehending the offender go, in the first instance, from the Justices in Session assembled, it should be in the following form, or to the like effect, in the name of the King, but under the teste of the chairman and one, or more, of the other Justices.

County of " George the Third, by the Grace  
— } " of God, of the united kingdom of  
to wit. " Great Britain and Ireland, King,  
" defender of the faith, and so forth; to our  
" Sheriff of Our county of — the high Con-  
" stable of the hundred of — the petty  
" Constables of the town of — and to all  
" and singular our bailliffs and other ministers  
" in the said county, — greeting. Foras-  
" much as P. O. of —, in the said county,  
" yeoman, hath personally come before A. B.  
" and other our Justices assigned to keep  
" the peace within the county aforesaid, and  
" also to hear and determine divers felonies,  
" trespasses, and other misdemeanors in the  
" said county committed, and hath taken a  
" corporal oath that the said P. O. is afraid  
" that D. D. of —, in the said county,  
" yeoman, will beat [wound, maim, or kill]  
" him [or burn his house,] and hath prayed  
" surety of the peace [or of the good behaviour,  
" if it be so] against him the said D. D.  
" Therefore we command and charge you,  
" jointly and severally, that immediately upon  
" receipt hereof, you omit not, by reason of  
" any liberty within the county aforesaid, but  
" that you take the aforesaid D. D. if he can  
" be found in the county aforesaid, and bring  
" him before the said A. B. and other our Just-  
" tices so as aforesaid assigned to keep the  
" peace within our county aforesaid, if they shall

“ be then sitting ; and if not, then before some  
 “ one or more of our said Justices in and for our  
 “ county aforesaid, to find sufficient surety and  
 “ mainprize, as well for his personal appearance  
 “ at the next General Quarter Session of our  
 “ Peace, to be holden at —— or elsewhere,  
 “ in and for the said county, as also for our peace  
 “ in the mean time to be kept towards us and  
 “ all our liege people ; and more especially  
 “ towards the said P. O ; that is to say, that he  
 “ the said D. D. shall not do, nor by any means  
 “ procure, or cause to be done, any of the said  
 “ evils to any of our said people, and particu-  
 “ larly to the said P. O ; [or, if it is for the  
 “ good behaviour, —— as also for his good  
 “ behaviour, in the mean time, toward us and  
 “ all our liege people ; and more especially  
 “ towards him the said P. O, &c. &c.]

“ If any party who is called at a Session of the Default to be  
 Peace upon a recognizance for keeping the <sup>recorded and</sup> certified,  
 peace, make default, the default shall be there  
 recorded, and the recognizance, with the record  
 of the default, shall be sent and certified into  
 the Chancery, or before the King in his Bench,  
 or into the King's Exchequer.”\*

However, if the party have any good excuse, May under  
 such as sickness, for his not appearing, it seems <sup>circum-  
stances</sup> <sup>stances</sup> that the Sessions are not bound peremptorily to be resited.  
 record his default, but may equitably consider

of the reasonableness of such excuse.\* This doctrine has indeed been doubted,† but general practice is conformable with the position ; and as the recognizance may be taken by a single Justice at any time, so soon as the offender is able to attend, a respite of proceedings by the Session, till that opportunity arrives, seems only consistent with justice and humanity.

May be forfeited. But there is no doubt but that it may be forfeited by any actual violence to the person of another, whether it be done by the party himself, or by others through his procurement, as manslaughter, rape, robbery, unlawful imprisonment, and the like,‡

And the Justices cannot in any case proceed against the party for a forfeiture of his recognizance, either in respect of his not appearing, or breaking the peace ; but that the recognizance itself, with record or default of appearance, ought to be removed into some of the Courts at Westminster, who shall proceed by *scire facias* upon such recognizance, and not by indictment.§

Proceedings when forfeited. And so it ought to be if it be presented by the jury, or grand inquest, that the party hath forfeited his recognizance by breach of the peace.||

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\* I Hawk. c. 60.      † Dalt. 119.

‡ I Hawk. c. 60.      § Ibid.

|| Lamb. 570. — Dalt. 119.

THE MOTIONS having been disposed of, Traverses <sup>tried.</sup> the next business for the Court is the trial of TRAVERSES.

The technical term TRAVERSE, from *trans-vertō*, to turn over, is applied to an issue taken upon an indictment for a misdemeanor, and means nothing more than *turning over*, or putting off, the trial, till a following Session or Assize. To traverse an indictment, then, is to take issue upon the chief matter thereof, or to deny the point of the indictment, but to be tried *at a future time*. The trial of these Traverses, at this point of time during the Session, or sitting of the Justices, and while the Grand Jury are still supposed to be considering of the bills arising out of the calendar of the day, pre-supposes the subjects to have been traversed at the preceding Session. It becomes necessary, therefore, for a moment, to travel back to that preceding Session, in order to trace the steps by which the subject now to be tried by the petty jury, has been prepared and placed in a condition for such trial. The persons bound, then, by recognizance at the last Session, are called to prosecute their Traverses at the present Session, for if a person indicted of a trespass, or other misdemeanor, appear, and plead not guilty, and traverse the indictment, he, of course, enters into recognizance to prosecute his traverse at the next Session; for, as we

have before seen, the Justices of the Peace may not *inquire, and determine, civil offences, in one and the same day*, because the party is to have convenient time to provide for trial.\*

Commencement of traverses proceedings.

The commencement, then, of the business is thus.

The party indicted comes into Court, and brings with him two sufficient pledges, and he, or his solicitor, delivers them, with their proper additions, to the clerk of the peace; which clerk then reads the indictment, to which the defendant pleads *not guilty*. Then the clerk of the peace calls upon the party indicted, by name, to enter into recognizance before the Court (which is taken in the common form) to try his traverse at the next Session, and not depart without leave of the Court. The principal and his pledges answer "*that they are content,*" and depart the Court.†

Two days, at least, before a traverse for a misdemeanor is intended to be tried at a Session of the Peace, the solicitor for defendant draws a

\* Cro. Car. 448. In felonies, a mere matter of fact, (the offence alledged to have been committed,) is to be tried; but in civil offences which are allowed to be traversed, many questions of right, which require much time for inquiry and preparation, may be involved; as in presentments for nuisances in not scouring a ditch, or repairing a road: for both the fact of its being a highway, and the obligation of the party indicted, or presented, to cleanse it, may come in question.

† Cro. Cir. Comp. 41.

notice thereof, and serves the prosecutor with a true copy, according to the following form.\*

*The King against A. B. at the prosecution of Y. Z.*

"Y. Z. Take notice, that I intend to appear Notice.  
"at the next (general or) Quarter Session of  
"the Peace, to be holden at \_\_\_\_\_, in \_\_\_\_\_  
"in and for the county of \_\_\_\_\_, on \_\_\_\_\_  
"next, being the \_\_\_\_\_ day of \_\_\_\_\_, by  
"eight o'clock in the forenoon of the same  
"day, and then and there try my traverse  
"upon the indictment which you have pre-  
"ferred against me for \_\_\_\_\_

*To Y. Z.*

*A. B.*

Having thus seen what are the preparations Trial.  
Made for the trial of a traverse *at*, and *after*  
the previous Session, we return to the time of  
trial.

The defendant must appear in Court, at the bar, in his proper person, and the solicitor prepares an affidavit of the service of the notice; in case the prosecutor does not appear.

When the defendant is at the bar, the clerk of the peace reads the indictment to the jury, and then says: "to which indictment the defendant hath pleaded not guilty: your business, gentlemen, is to inquire whether he be guilty or

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\* Two days for the Sessions of the Peace, and eight for the Assizes.

" not guilty, and hearken to your evidence;" then the crier maks proclamation : " O-yez, if " any one can inform the King's Justices, the " King's attorney, the King's serjeant, or this " inquest now to be taken, let them come forth " and they shall be heard, for the defendant " stands at the bar upon his discharge."

Then the prosecutor, and all the witnesses\* that appear to be indorsed on the indictment, are called to give evidence, and are heard; and if the defendant be found guilty, the Court sets a fine upon him adequate to the offence, or other punishment, as the law directs.

Prosecutor  
not appear-  
ing.

If a prosecutor does not appear against the defendant, according to the notice, the defendant is acquitted, the prosecutor being (by the crier) called three several times to come and give evidence; then the chairman says to the jury to this effect : " Gentlemen, A. B. stands indicted for making an assault upon, " Y Z ; the prosecutor does not appear to give " evidence; therefore without you know of your " own knowledge that the defendant is guilty, " you must acquit him;" and thèreupon the jury being asked (by the clerk of the peace) " whether the defendant is guilty or not guilty," they say, " not guilty.†

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\* Writs of subpœna it is supposed have been previously served on them from the clerk of the peace.

† Cro. Cir. Comp. 43.

A record of the traverse is to be made by the clerk of the peace, wherein is to be comprehended a succinct history of the whole proceedings, the stile of the court, the indictment, the process to compel an answer, the traverse itself, the trial by the jury, their verdict, the judgment of the court, execution and fine assessed.

In case of trespass and assault, the court frequently recommends the defendant "to speak with" the prosecutor (that is, to make him amends for the injury done him); and if the prosecutor come and acknowledge a satisfaction received, the court will set a small fine on the defendant, as three shillings and four pence, or twelve pence. But Sir William Blackstone, very strongly reprobates this practice of permitting the defendant to *speak with the prosecutor*, as it is termed; for, he observes, that "it is a dangerous practice; and that though it may be entrusted to the prudence and discretion of the judges in the superior courts of record, it ought never to be allowed in local or inferior jurisdictions, such as the Quarter Sessions, where prosecutions for assaults are by this means too frequently commenced, rather for private lucre, than for the great end of public justice. Above all, it should never be suffered where the testimony of the prosecutor himself is necessary to convict the defendant; for by this means the rules of evidence are entirely subverted, the prosecutor becomes in effect a plaintiff, and yet

is suffered to bear witness for himself, nay even a voluntary forgiveness by the party injured ought not in true policy to intercept the stroke of justice.”\*

Pleading guilty.

Sometimes the prosecutor and defendant agree before the defendant pleads to the indictment, and then the defendant comes into court in his proper person, and pleads guilty to the indictment; and upon proving (by a subscribing witness) or an affidavit made and filed, a general release executed by the prosecutor, the defendant submits to a small fine, (to wit) such as the court is pleased to impose for the offence against the King’s peace.

Before this division of the subject be entirely closed, it may be not altogether superfluous to observe that the punishment for assaults, like other trespasses and misdemeanors, being fine and imprisonment, the degrees of these two

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\* 4 Black. Com. 363. Every man who has any experience as a Justice of the Peace, must concur with the Judge in his suggestion respecting the motives which too often influence prosecutions for assault; but it may fairly be asserted that such motives do not prevail more in prosecutions at the Sessions before Justices, than at the assizes before Judges, although the rank and situation of the parties prosecuting at one or the other, may somewhat vary. And it may not unreasonably be admitted that the Justices of the Peace, being better acquainted with the characters of the parties living in their immediate neighbourhood, than the Judges of Assize can be, who are mostly strangers to the country, are therefore at least as adequate to determine in what instances a practice generally censurable, may be occasionally beneficial.

constituent parts of it ought to be respectively proportioned not only to the *nature* and *magnitude*; of the *offence*; but to the *rank*, *situation*, *health*, and other circumstances of the *offender*. Some assaults, which are made *with intent* to commit some more enormous crime, as to spoil the wearing apparel of the person assaulted; to rob him; or on account of money won at gaming; are made obnoxious to a higher punishment than fine and imprisonment by special statutes;\* but there are others, where the intent is laid and also proved, to be to commit rape, buggery, &c. which call for imprisonment of more than usual duration and strictness; and other cases in which the quarrelsome disposition of the offender, threats of repeating the offence, general behaviour in prison, and a great variety of other considerations, make it reasonable in the Court also to require sureties from the prisoner for his further keeping the peace, a practice which has obtained much of late years, and cannot be too highly recommended, inasmuch as it thereby becomes the interest of his pledges to keep him within the bounds of decorum.

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THESE matters being dispatched, if the Grand Jury have found any bills, it may be convenient to try the Prisoners, in order that the petty

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\* See Pract. Expos. *Title, PEACE, BREACH OF, BY ASSAULT.*

Jurors (many of whom come from considerable distances) may be set at liberty in reasonable time, reserving the appeals till nearer the concluding business of the Court.

When the Grand Jury have agreed upon any bills, they bring the same into Court: and the clerk of the peace calls every juryman by his name, who severally answer, to signify they are present; and the foreman of the jury hands the indictments to the clerk of the peace, who thereupon says to the jury thus: "Gentlemen, you agree the Court shall amend matter "of form, altering no matter of substance?" The jury signifying their consent, the clerk of the peace reads the names of the offenders, and offences, of every indictment, whether the bills are found to be true or not (as endorsed by the jury;) and on those bills not found, the clerk of the peace makes a cross, or other private, mark.\*

The gaoler being called to set his Prisoners to the bar, and the crier being called to make a bar, that is, to dispose of the company, that a way may be made open from the court to the Prisoners, and that the Court, jury, and prisoners may see each other, one of the Prisoners is called to:—A. B. *hold up your hand.*†

Though this holding up of the hand may seem a trifling circumstance, yet it is of this

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\* Cro. Cir. Comp. 34. † Dalt. c. 125.

importance, that thereby he admits himself to be the person indicted.

However, the ceremony of holding up the hand is not required in the case of a peer, nor is it of absolute necessity in the case of a common person.\*

For being calculated merely for the purpose of identifying the person, any other acknowledgment will answer the purpose as well; therefore if the Prisoner obstinately and contemptuously refuses to hold up his hand, but confesses he is the person named, it is sufficient.†

And this is called the *arraignment* of the Arraigned Prisoner, and to arraign, is nothing else, but <sup>ment</sup> to call the Prisoner to the bar of the Court to answer the matter charged upon him in the indictment.‡

The Prisoner is to be called to the bar by his name; and it is laid down in Bracton, that that though under an indictment of the highest nature, he must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape, and then he may be secured with irons; but they now usually come with their shackles upon their legs, for fear of an escape, but

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\* 2 Hale's Hist. 219.

† 4 Black. Com. 325.

‡ 2 Hale's Hist. 216.

stand at the bar unbound till they receive judgment.\*

The arraignment of a Prisoner therefore consists of these parts :

1st, The calling the Prisoner to the bar ; as has been stated.

2ndly, Reading the indictment distinctly to him in English, that he may fully understand his charge.

3dly, Demanding of him whether he be guilty or not guilty ;† in the following manner :

*You A. B. stand indicted by the name of A. B, for that you, &c. so read the indictment through, and then ask the Prisoner, How say you, A. B. are you guilty, or not guilty?*

If he answer that he is guilty, then the confession is recorded, and no more done till judgment.‡

If he make no answer at all, and will not plead, he shall have the same judgment as if he had confessed the indictment.§

But if he say *not guilty*, he is then asked, *how will you be tried?* to which the common answer is, *By God and the country* : then the clerk says, *God send you a good deliverance* and writes over the Prisoner's name on the indictment, *po, se* ; that is, *ponit se*, puts himself upon God and the country.||

\* Ibid.—4 Black. Com. 322. † Ibid.

‡ Dalt. 185.—Cro. Cir. Comp. 12.

§ 12 Geo. 3, c. 20.

|| 2 Hale's Hist. 119.—Cro. Cir. Comp. p. 12.

But if the Prisoner have any matter to plead either in abatement, or in the bar of the indictment, as misnomer, a former acquittal, former conviction, a pardon, or other matter, he pleads it without immediately answering to the felony.\*

Here then we must pause awhile, in the proceedings of the Court, to consider the indictment itself, and its component parts; and although general rules are all that can be desirable, or even useful, in a mere manual of this description, the items must be necessarily numerous.

Two subjects relative to indictments first present themselves, viz, the **CAPTION** of the indictment, and the **BILL** itself. For the **Caption** is no part of the bill, but it is the style or preamble; and every such caption is erroneous which does not set forth with proper certainty, both the court *in which*, and the jurors *by whom*, and also the time and place *at which*, the indictment was found. The record of the Indictment as it stands upon the file of the Court where it is taken is short, only thus:—“*The Jurors of our, Lord, the King upon their oath present, &c.*” but when the record is removed from the inferior Court by *certiorari*, to a superior one, the caption must

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\* 2 Hale's Hist. 219.

be full and explicit, and contain all these particular circumstances.\*

Requisites in an indictment.—As to the INDICTMENT itself ;—the 76. requisite, and most considerable, parts of it are,

1, the name, and addition, of the party offending ; 2, the day, and year, of the offence committed ; 3, the place where it was committed ; 4, upon, or against, whom committed ; 5, the manner of the commission of it : 6, the fact itself, and the nature of it ; 7, the conclusion.

**Name.** 1st. Then, the name of the party indicted regularly ought to be inserted, and inserted truely, in every indictment.†

But an indictment that the King's highway in such a place is in decay through the fault of the inhabitants of such a town, is good without naming any person in certain.‡

**Additions.** Also, “ in all indictments on which process of outlawry lies, to the names of the defendants additions shall be made of their estate, or degree, or mystery, and of the town or hamlets, or places, and counties where they were, or be, conversant.”§

If the christian name be wholly mistaken, this is regularly fatal to all proceedings.

\* 1 Hawk. c. 25.—2 Hale's Hist. 165.

† 2 Hale's Hist. 174.

‡ 2 Hawk. c. 26.

§ 1 Hen. 5. c. 5.

But a person *cannot take advantage of a Mistaken mistaken surname in an indictment*, either by <sup>names.</sup> plea in abatement or otherwise, notwithstanding such surname have no affinity with his true one.\*

However, every other misnomer of the defendant, except that of the surname, is fatal; for a misnomer of the defendant's name of baptism may be pleaded in abatement of an indictment.†

And it is necessary also to give every person his proper *addition or title*, and it is fatal <sup>Mistaken titles.</sup> if it be not done. If a man have several titles, he must be described by the most honorable; and if he have none by birth, office, creation or reputation, and he be described by any such; or where a *gentlewoman* is named merely *spinster*, or a *yeoman* is named *gentleman*, and in all such like cases, if such matter be pleaded in abatement, and found for the person who pleads it, the writ shall abate.‡

But a Trader may be sued either by his degree or rank in society, independent of his trade, or by the name of his vocation.§

*Gentleman*, or *esquire*, are either, of them *proper titles of men and women*, good additions for the estate and degree of a

\* 2 Hawk. c. 25.

† Ibid.

‡ 2 Inst. 699.

§ 2 Lord Raym. 1542.

man, gentlewoman for that of a woman. Labourer is also a good addition for the estate and degree of a man, but not for that of a woman ; and widow, single woman, wife of *J. S.*, spinster, are good additions of the estate and degree of a woman ; but burgess, and citizen, and servant, are all of them too general, and therefore not good additions of the state or degree either of a man, or woman.\*

**Several defendants with the same addition.** And if several defendants, of different names, have the same addition, it is safest to repeat the addition after each name, applying it particularly to every one of them ; and where a father hath the same name, and the same addition, with a defendant, being his son, a writ is abatible, unless it add the addition of *the younger* to the other additions ; but where the father is alone the defendant, it is said that there is no need of the addition of *the elder*. And if the son be *in the custody of the marshal*, and so declared against, it is said that the count is good without the addition of *the younger*, unless the father of the same name and addition be also in the custody of the marshal.†

**Addition after alias.** It is a fatal fault to apply such additions to the name which come under the alias dictus only, and not to the first name : but it is said not to be material whether any addition be put to the

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\* 2 Hawk. 23.

† Ibid.

name which comes under *alias dictus* or not, because what is so expressed is not material.\*

The additions of the estate, *degree and mystery* of the party are not sufficient, unless they be the same which he had at the time of the writ; and in this respect such additions differ from that of place, which is sufficiently shewn by naming the defendant *late of* such a place.

Also such addition must be expressed in such manner, that it may plainly appear to refer to the party; and therefore it is not well expressed by the addition of his mystery, naming him son of A. of B. butcher, because butcher refers to A. rather than to the son.†

The word *mystery* includes all lawful arts, trades, and occupations; and if one, under the degree of a gentleman, have divers of such arts, trades, or occupations, he may be named by any of them.‡

But the addition of farmer, seems to be an insufficient addition, because if any mystery be implied to the notion of it, it is that of husbandry, of which *husbandman* is the proper addition.

With respect to place of residence, it is a good addition of this kind to name the party *late of such a town*, in which respect this addition differs from that of the *estate, degree, or*

\* Staunf. P. C. 68.—Leach. C. L. 355.

† 2 Inst. 670.—2. Hale's Hist. 177. ‡ 2 Just. 668.

*mystery*; and it is said that if a defendant be named of A. and late of B. it is sufficient to prove either addition.\*

Several persons indicted for one offence. If several persons be indicted for an offence; misnomer or want of addition of one, quasheth the indictment only against him, and the rest shall be put to answer, for they are in law as several indictments.†

Defendant not obliged to take advantage of misnomer. A person, though his name be mistaken, is not *obliged* to take advantage of it; and therefore if a person be indicted and acquitted of a crime, and afterwards he is indicted for the same offence, in which second indictment the crime is described to be the same in substance, with some variation of the name or addition, &c, he may make good the variance, by averring that he was the same person meant in both.‡

Must make his election before he pleads. So though the name and addition of the party indicted, ought to be inserted, and inserted truly in every indictment; yet, if the party be indicted by a wrong name, or addition, and he plead to that indictment *not guilty*, or answer to that indictment upon his arraignment by that name, he shall not be received after to plead misnomer or falsity of his addition, for he is concluded, and estopped by his plea by that name.

\* Str. R. 924.

† 2 Hale's Hist. 177.

‡ 2 Hawk. c. 23.

Therefore he that will take advantage of the misnomer of his name, or addition, must do it upon his arraignment, and the entry must be special.

After all, there is little advantage accruing to the Prisoner, by means of these dilatory pleas; because if the exception be allowed, a new bill of indictment may be framed, according to what the Prisoner in his plea avers to be his true name and addition. For it is a rule, upon all pleas of abatement, that he who takes advantage of a flaw, must at the same time shew how it may be amended.

Therefore the safest way, in criminal cases, is to allow the party's plea of misnomer, for he that pleads misnomer, must in the plea set forth what his true name is, and then he concludes himself; and if the Grand Jury be not discharged, the indictment may presently be amended, and returned according to the name he gives himself.\*

2. As to the day and year of the offence committed. This is necessary to be contained in the indictment. For it is laid down as an undoubted principle, in all the books that treat of this matter, that no indictment whatsoever can be good without precisely shewing a certain year and day of the material facts alleged in it. But if an indictment lay the offence on an un-

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\* 2 Hale's Hist. 175.—4 Black, Com. 335.

certain, or impossible, day, as where it lays it on a future day, or lays one and the same offence at different days, or lays it on such a day, which makes the indictment repugnant to itself, it is void; and it hath been adjudged, that no defect of this kind can be helped by the verdict.\*

**Offences committed in the night.**

If the offence be committed on the night before midnight, it must be laid in the indictment as of the day before; and if after midnight, as of the day after.†

**Assaults.**

In indictments for assaults there need not be a repetition of the time, or even a reference to it, as the time first laid will be connected with all the subsequent facts. But in indictments for felony it is otherwise, and especially where the crime consists of a continuation of facts.‡

**Felonies.**

In short every *material* fact which is issuable and triable, must be laid with time and place.§

**Omissions.**

Where an indictment, however, charge a man with a bare omission, such as not scouring a ditch, or repairing a certain piece of road, which he may be bound to do by tenure, or prescription, time is not necessary to be stated, because it is a *present* evil which is complained of.||

**Place where.**

3; As to *place*.—The venue is necessary for

\* 2 Hawk. c. 25.

† Lamb, b. 4. c. 5.

‡ 2 Hale's Hist. 178.

§ 5 Term R. 620.

|| 2 Hawk. c. 25.

trial of an offence ; but a mistake of *precise* place will be immaterial, so long as on the evidence it appear to have been committed within the parish at least, but perhaps within the jurisdiction.\*

4. As to *the person against whom committed*, Person against whom, it is sufficient to observe, that if he be known, his name ought to be inserted, but if he be not known, his name is not requisite for supporting an indictment.†

5. The *manner of the commission*. An in- Manner of dictment being merely a plain, and certain, nar- Commission rative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact, and its nature, in which, in favour of life, great strictnesses have at all times been required, it is therefore laid down as a good general rule, that in indictments the special manner of the whole fact ought to be set forth with a scrupulous certainty, that it may judicially appear to the Court that the indictors have not gone upon insufficient premises.‡

Hence, it hath been holden, that no periphrasis Particular or circumlocution whatsoever, will supply those technical expressions words of art which the law has appropriated necessary, for the description of the offence ; as *burglari-*

\* 2 Hawk. c. 25.—5 Term. R. 162.

† 2 Hale's Hist. 181.

‡ Caldecott's Cases, 187.

*ously* in an indictment of burglary; *feloniously* in an indictment of felony, and the like.

Also an indictment charging a man disjunctively is void; as that he beat, *or* caused to be beaten, for here are distinct offences, and it appears not of which of them the inditors have accused him.\*

Accusation  
in general  
terms.

Also an indictment accusing a man in general terms, without ascertaining the particular fact laid to his charge, is insufficient; for no one can know what defence to make to a charge which is uncertain, nor can plead it in bar or abatement of a subsequent prosecution. But “common barreter and disturber of the peace of our Lord the King,” &c. is good; because barretry is an offence known.

Also an indictment against one for being a common scold is good without setting forth the particulars.†

Nor is it necessary to prove the particular expressions used, it is sufficient to prove generally, that she is always (as the report says) scolding. But though the indictment is good in a general *form* with these words, yet it has always been held that the prosecutor must give the defendant notice before the trial of the particular instances of the offences that are meant to be proved.‡

\* 2 Hawk. c. 25.

† Ibid.

‡ 1 Term. R. 75 4.

An indictment against a man for that "he ~~in larceny.~~  
feloniously took and carried away goods and  
hathels of another," without shewing what is  
ertain, as *one horse*, *one ox*, or the like, is not  
good.

Also the number of things stolen must be ex- Number of  
pressed in the indictment; for it is not suffi- things stolen  
cient to say *feloniously did steal sheep*, without  
xpressing their number.

And the value of any thing stolen must also Value of  
be set down in the indictment, that it may ditto.  
appear whether it be *grand*, or *petit*, larceny.\*

Figures to express numbers are not allowable Figures not  
in indictments, but numbers must be expressed admissible,  
in words; except where any instrument is to be  
set out in an indictment, for in that part the  
manuscript must be an exact copy.†

6. The *fact itself*, and *the nature of it*, must Facts not to  
be set out precisely, positively, and substan- be stated by  
tively, and not by way of recital, as with a tal.  
whereas; and it must expressly allege every  
thing material in the description of the sub-  
stance, nature, and manner of the crime, for no  
intendment shall be admitted to supply a defect  
of this kind. Thus, murder must be laid to be  
committed with *malice aforethought*, for with-  
out that allegation, it is not murder; robbery  
must be stated to be done *feloniously*; house-  
breaking in the night, *burglariously*, &c.

\* Hale's Hist. 182.—Lamb. 497.

† 2 Hale's Hist. 170.—Cro. Cir. Comp. 94.

Offences by statute. Also an indictment, grounded upon an offence made by act of parliament, must, *by express words*, bring the offence within the substantial description thereof; and those circumstances mentioned in the statute to make up the offence shall not be supplied by the general conclusion, *against the form of the statute*. And so it is, where an act of parliament ousts clergy in certain cases, for though the offences themselves were all at common law, yet as they were at common law within clergy, the parties, if convicted, shall not be ousted of clergy unless these circumstances, as, *of malice aforethought, or in or near a highway, &c.* be expressed in the indictment.\*

But there is no necessity in any indictment on a public statute to recite such statute, for the judges are bound *ex officio* to take notice of all public statutes.

Wrong recital of a statute.

Yet if the prosecutor take upon him to do it, and materially vary from a substantial part of the purview of the statute, and conclude *against the form of the statute*, he vitiates the indictment.

But no advantage can be taken of a variance from any part of a *private* statute, without shewing it to the court in a proper manner; because otherwise such statute shall be taken to be as it is recited.†

\* 2 Hale's Hist. 170.      † 2 Hawk. c 25.

7. *As to the conclusion.* Regularly every Conclusion. indictment ought to conclude *against the Peace of our Lord the King, his crown and dignity*, and therefore an indictment without such conclusion is insufficient, though it be but for using a trade, not being an apprentice; for every offence against a statute is *contra pacem*, and ought so to be laid.

And if a man be indicted for an offence supposed to be committed in the time of a former King, and it conclude against the peace of our Lord the now King, it is insufficient; for it must be supposed to be done against the peace of that King in whose time it was committed.

But if an offence be supposed to be begun in the time of one King, and continued in the time of his successor (as a nuisance,) it must conclude against the peace of both Kings, or else it is insufficient.\*

It was formerly holden, that no indictment grounded on a statute, and concluding against the form of the statute, could be maintained as an indictment at common law, if it were not maintainable as an indictment on some statute, because it appears that the prosecution is grounded on a foundation which will not support it: but the law is now taken to be otherwise; and accordingly it hath been adjudged,

\* 2 Hale's Hist. 189.—3 Burr. R. 1903.—Cro. Cir. Comp. 94.

that on a special indictment on the statute of Stabbing, the defendant may be found guilty of general manslaughter at common law, and the words "*against the form of the statute*" rejected as senseless.

But it is agreed, that a judgment on a statute shall never be given on an indictment which doth not conclude against the form of the statute; and therefore if the fact indicted be an offence prohibited by statute *only*, and the indictment conclude not "*against the form of the statute*," no judgment can be given upon it; for though an indictment, which is redundant, may be helped by rejecting what is senseless, an indictment that is defective, in a material part, can be no way supplied.\*

**Every man  
must answer  
for his own  
offences.**

Having thus gone briefly through the component parts of an indictment, so far as to give unexperienced persons some general notion of its construction, it is only necessary further to observe, that although the offences of several persons cannot but be several, because one man's offence cannot be another's, but every man must answer for himself; yet if it wholly arise from a joint act which is in itself criminal, as where several join in keeping a gaming-house, or in deer-stealing, or maintenance, extortion, or the like, the defendants may be indicted jointly and severally, as that they and

\* 2 Hawk. c. 25.

each of them did so and so, or jointly only, for it sufficiently appears, that if all are joined in such act, each must be guilty; and therefore some of them may be convicted, and some acquitted.

But where the offences arise from a joint act, which in itself is not criminal, but may be so by reason of some personal defect peculiar to each defendant, as where divers followed a joint trade, for which the law required a seven years apprenticeship, in which case each trader's particular defect, and not the joint act, made him guilty, it was most proper to indict them severally, and not jointly, because each man's offence was grounded on a defect peculiar to himself.

And for this reason indictments have been quashed for jointly charging several defendants for not repairing the streets before their houses, or for neglecting a day of fasting appointed by proclamation; and this is agreeable to the rule of law as to bringing actions on penal statutes, wherein several defendants shall not be joined, except it be in respect of some one thing in which all are jointly concerned.\*

After this general explanation, the few following specimens of the actual construction of indictments on some of the most common occasions may suffice.

*Indictment for a common Assault.*

County of { " The Jurors for our Lord the King  
 \_\_\_\_\_ } " upon their oath, present that  
 " A. B. late of the parish of \_\_\_\_\_ in the  
 " county of \_\_\_\_\_ yeoman, on the \_\_\_\_\_ day  
 " of \_\_\_\_\_ in the \_\_\_\_\_ year of the reign of  
 " our sovereign Lord George the Third, &c.  
 " with force and arms at the parish of \_\_\_\_\_  
 " in the county aforesaid, in and upon one P.  
 " Q. in the Peace of God and our said Lord  
 " the King, then and there being, did make an  
 " assault ; and him the said P. Q. then and  
 " there did beat, wound, and ill-treat, so that  
 " his life was greatly despaired of, and other  
 " wrongs to the said P. Q, then and there did,  
 " to the great damage of the said P. Q. and  
 " against the Peace of our said Lord the King,  
 " his crown and dignity."

*For Larceny.*

County of { " The Jurors for our Lord the King  
 \_\_\_\_\_ } " upon their oaths present that A.  
 " B. late of \_\_\_\_\_ in the county of \_\_\_\_\_ on  
 " the \_\_\_\_\_ day of \_\_\_\_\_ in the \_\_\_\_\_ year  
 " of our sovereign, Lord George the Third,  
 " King, &c. with force and arms at the parish  
 " aforesaid, in the county aforesaid, one  
 " silver tankard, of the value of fyfe pounds  
 " of lawful money of Great Britain, of the  
 " goods and chattels of one M. N. two silver  
 " tea-spoons of the value of twelve-shillings,  
 " and one linen shirt of the value of eight

“ shillings of the goods and chattels of one P.  
“ Q. then and there being found, **FELONIOUSLY**  
“ **did STEAL, TAKE, and CARRY-AWAY**, against  
“ the peace of our said Lord the King, his crown  
“ and dignity.”

*Against a Constable for extorting money from  
a person apprehended by him on a Bench  
warrant, to let him go, without carrying him  
before a Justice of the Peace:*

County of { “ The Jurors of our Lord the King  
\_\_\_\_\_ { “ on their oath present that A. B.  
“ late of \_\_\_\_\_ in the county of \_\_\_\_\_ yeo-  
“ man, on the \_\_\_\_\_ day of \_\_\_\_\_ in the  
“ \_\_\_\_\_ year of our sovereign Lord George  
“ the Third, &c. then being one of the Con-  
“ stables of the same parish, at the parish afore-  
“ said, in the county aforesaid, did take and ar-  
“ rest one G. H, labourer, under colour of a  
“ certain warrant commonly called a Bench-  
“ warrant, which he the said A. B. then and  
“ there had to apprehend the said G. H. to  
“ answer to a certain trespass and assault of  
“ which the said G. H. then stood indicted  
“ as the said A. B. then and there alleged and  
“ pretended, and the said A. B. him the said  
“ G. H. then and there had in his custody, and  
“ that the said A. B. afterwards to wit the same  
“ day and year at the parish aforesaid, in the  
“ county aforesaid, unlawfully corruptly, de-  
“ ceitfully and extorsively, for wicked gain-

" sake, and contrary to the duties of his office,  
 " did extort, receive, and take of the said G.  
 " H. the sum of ten shillings of lawful money  
 " of Great Britain, for discharging the said G.  
 " H. out of the custody of him the said A. B.  
 " without conveying him before any Justice  
 " of the Peace for the said county, to answer  
 " to the said trespass and assault whereof he  
 " was supposed to stand indicted as aforesaid,  
 " in contempt of our said Lord the King and  
 " his laws, to the evil example of all others  
 " in the like case offending, and against the  
 " Peace of our said Lord the King, his crown  
 " and dignity.

*For a Conspiracy among work-men to raise their wages.*

County of { " The Jurors for our Lord the King  
 \_\_\_\_\_ { " upon their oath, present that  
 " A. B. late of — C. D. late of — and E. F.  
 " late of — all in the county of — on the  
 " — day of — in the — year of  
 " the reign of our sovereign Lord George the  
 " Third, &c. being workmen and journeymen  
 " in the art, mystery, and manual occupation of  
 " a (here state the trade) and not being conten  
 " to work or labour in that art and mystery,  
 " by the usual number of hours in each day,  
 " and at the usual rates and prices, for which  
 " they, and other workmen and journeymen,  
 " were wont, and accustomed to work, but

“ falsely and fraudulently conspiring and combining unjustly and oppressively to increase and augment the wages of themselves and other workmen and journeymen in the said art, and unjustly to exact and extort great sums of money for their labour and hire in their said art, mystery, and manual occupation, from their masters who employ them therein, on the same day and year at the parish aforesaid, in the county aforesaid, together with divers other workmen and journeymen in the same art, mystery, and manual occupation, unlawfully did assemble and meet together, and so being assembled and met, did then and there unjustly and corruptly conspire, combine, and agree among themselves, that none of the said conspirators after the said —— day of —— would work at any lower or lesser than (here state the increased wages demanded) and also that none of the said conspirators would work day work or labour any longer than from the hour of (here state the hour of the morning, if that make any part of the conspiracy) in the morning, till the hour of —— in the evening in each day, to the great damage and oppression, not only of their masters employing them in the said art, mystery, and manual occupation, but also of divers other his Majesty's liege subjects, to the evil example of all others in the like case offending, and against the Peace

“of our said Lord the King, his crown and  
“dignity.”\*

*For keeping a disorderly House.*

County of { The Jurors for our Lord the King,  
\_\_\_\_ { upon their oath present, that A.  
“B. late of the parish of \_\_\_\_ in the county  
“of \_\_\_\_ labourer, on the \_\_\_\_ day of  
“\_\_\_\_ in the \_\_\_\_ year of our sovereign  
“Lord George the Third, &c. and at divers  
“other days and times, between that and the  
“day of taking this inquisition, with force and  
“arms at the parish aforesaid, in the county  
“aforesaid, did keep and maintain, and yet doth  
“keep and maintain, a certain common ill-  
“governed and disorderly house, and in his  
“said house for his own lucre and gain, certain  
“evil and ill-disposed persons, as well men as  
“women, of evil name and fame, and of dis-  
“honest conversation, to frequent and come  
“together then, and at the said other days and  
“times, there unlawfully and wilfully did

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\* This form is for the common law indictment, but requires only the additional words “and against the form of the statute in that case made and provided;” (which stat. is 2 and 3 Edw. 6. c. 15.—) on an indictment for the statutable offence of the same kind; for the statute was made in affirmation of the common law, and the only difference is in the measure of punishment after conviction. A summary remedy is now given for this species of offence by 39 and 40 Geo. 3. c. 106, which may, indeed, be generally more convenient, but it does not supersede the old remedy by indictment.

" cause, and procure ; and the said men and  
 " women in his said house at unlawful times, as  
 " well in the night as in the day, then and at  
 " the said other days and times, there to be  
 " and remain, drinking, tipling, whoring, and  
 " misbehaving themselves, unlawfully and wil-  
 " fully did permit, and yet doth permit, to the  
 " great damage and common nuisance of all  
 " the subjects of our said Lord the King, and  
 " against the Peace of our said Lord, the King,  
 " his crown and dignity,

*For forestalling the Market.*

County of " The Jurors for our Lord the King,  
 " upon their oath present, that A.  
 " B. late of the parish of —— in the county  
 " of —— yeoman, on the —— day of ——  
 " in the —— year of the reign of our sove-  
 " reign Lord George the Third, &c. at the  
 " parish aforesaid, in the county aforesaid, did  
 " buy, and cause to be bought, of and from  
 " one D. E. five hundred pounds weight of  
 " cheese for the sum of —— of lawful money  
 " of Great Britain, as he, the said D. E. then  
 " and there was coming toward the market of  
 " —— to sell the said five-hundred pounds  
 " weight of cheese, and before the same was  
 " brought into the said market, where the  
 " same should be sold ; in contempt of our said  
 " Lord the King and his laws, to the evil  
 " example of all others in the like case offend,

“ ing, and against the peace of our said Lord  
“ the King, his crown and dignity.”\*

Witnesses  
called.

“ We now return to the proceedings on the trial.  
• The Prisoner having put himself upon his  
country, the prosecutors and witnesses are next  
called on their recognizances, and they take the  
place assigned to them by the Court.

Jury called.

Then, the Petty Jury are called on their  
panel by the clerk of the peace in this manner :  
“ You good men that are returned and im-  
“ panelled to try the issue joined between our  
“ Sovereign Lord the King and the Prisoner at  
“ the bar, answer to your names, upon pain  
“ and peril that shall fall thereon ;” which  
done, and a full jury appearing, the clerk  
of the peace calls the Prisoner to the bar  
and says to him : “ These good men that were  
“ last called and have appeared, are those  
“ which are to pass between our Sovereign  
“ Lord the King and you (upon your several

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\* The foregoing are indictments for offences at common  
law ; those for offences against Statutes must pursue the words  
of the Statutes in describing the offences, and conclude in addition,  
“ and against the form of the statute in that case made  
and provided.”

The non-repair of roads, presents one of the most common  
occasions for indictments at the Quarter Sessions, but the  
form of a *presentment* by a Justice of the Peace having  
been given in a previous page, and that not differing from  
an *indictment* in any essential points, it was not thought  
necessary to insert a specimen of the latter.

“ lives and deaths if it be a capital offence)  
 “ if therefore you will challenge them, or  
 “ any of them, your time is to speak, as  
 “ they come to the book before they are sworn,  
 “ and you shall be heard;”\* then Procla-  
 mation is made by the crier of the Court to  
 the following effect: “ If any can inform  
 “ the King’s Attorney or this Court of any  
 “ treasons, murders, felonies, or other misde-  
 “ meanors against A. B. the Prisoner at the  
 “ bar, let them come forth, for the Prisoner  
 “ stands upon his deliverance:†

Challenges are of two kinds, viz. either to Challenges. the *array*, or to the *polls*.

Challenges to the *array* are at once an exception to the whole panel, in which the jury <sup>ray.</sup> are *arrayed*, or set in order, by the sheriff in his return.

And this kind of challenge is two-fold, either a *principal cause* of challenge or to the *favour*.

A *principal cause* of challenge is grounded on such a manifest presumption of partiality, that if it be found true it unquestionably sets aside the *array*, or the juror.

And there are many *principal causes* of chal- <sup>Principal</sup> lenge to the *array*, viz. if the sheriff, or other <sup>causes,</sup> officer, be of kindred or affinity to the plaintiff

\* 2 Hawk. c. 25.

† Dalt. c. 185.—Cro. Cir. Comp. 13,

or defendant, if the affinity continue;—if the officer return any juror on the nomination of either party, the whole array shall be quashed. If the plaintiff or defendant have an action of battery against the sheriff, or the sheriff against either party, this is a good cause of challenge; So if the plaintiff or defendant have an action of debt against the sheriff; so if the sheriff or his bailiff which returned the jury be under the distress of either party;—or if the sheriff or his bailiff be either of counsel, attorney, officer, or servant of either party, or arbitrator in the same matter, the array may be well challenged.\*

To the favor.

As to a challenge to the array *for favor*, it being no principal challenge, must be left to the conscience and discretion of the triers; as if either of the parties be tenant to the sheriff, or if the sheriff have an action of debt against either of the parties, these are causes of challenge to the favor only; for the sheriff thereby is not under the party's influence, but the party under his.† It is said that the subject cannot take a challenge for favor against the King, without shewing some actual partiality in the sheriff or juror, or some particular cause in respect whereof the King may influence them.‡

\* Co. Lit. 156.

† 3 Black. Com. 359.

‡ 2 Hawk. c. 43,

Challenges to *the array* are now however so infrequent, that we pass on to consider challenges to the *polls*.

A challenge to the *polls*, is a challenge to *the Polls*, the particular jurors, and these challenges also are two-fold; either *peremptory*, or for *cause* shewn.

A *peremptory* challenge is so called, because *peremptory*, a person may challenge *peremptorily* upon his own mere dislike, without shewing any cause.\*

The numbers that might be challenged *peremptorily* have been varied at different periods, by divers statutes,† according to the nature of the offence; but now the privilege stands thus. In treason of every description the Prisoner may challenge thirty and five *peremptorily*, but in other felonies only twenty.‡—The King however shall not be allowed a *peremptory* challenge.§

A challenge to the *polls*, for *cause* shewn, for *cause* is either principal, or to the favor.

And the principal challenge is reduced to four heads *propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter defictionem*.

\* Co. Lit. 156.

† 22 Hen. 8. c. 14.—32 Hen. 8. c. 3.—33 Hen. 8. c. 23.

1 & 2 Ph. & Mar. c. 10.

‡ 4 Black. Com. 354.

§ 33 Edw. 1. St. 4.

**Respectum.** 1. *Propter honoris respectam*, or *in respect to the rank and dignity of the juror*; as if a lord of parliament be impanelled on a jury, he may be challenged by either party, or he may challenge himself.

**Defectum.** 2. *Propter defectum*: or *for a defect*; as if a juryman be an alien born, this is defect of birth.

So if the juror be within the age of twenty-one, it is a good cause of challenge,\* and is *defect of age*: or that he hath not sufficient estate, this is *defect of estate*.†

**Affectum.** 3. *Propter affectionem*, or *for suspicion of bias, or partiality*. Therefore if the juror be of the blood or kindred to the party in the prosecution; or under his power or direct influence, as tenant, or servant, or of council with him;‡ So if he has declared his opinion beforehand respecting the guilt of the Prisoner.§

And an exception against a juror, that he hath found an indictment against the party for the same cause, hath been adjudged good; and also upon another indictment when the same matter is in question, or happen to be material, though not directly in issue. But it is no good cause of challenge that the juror

\* 3 Black. Com. 361.

† Ibid.

‡ Ibid.

§ 2 Hawk. 43.

hath found *others* guilty on the same indictment; for the charge is several against each.\*

It is also a good cause of challenge on the part of a Prisoner, that the juror has a claim to the forfeiture which would ensue from the Party's attainder or conviction.† Lord Coke says, "If either party labour the juror, and give him any thing to give his verdict, this is a principal challenge: but if either party barely labour the juror to appear and to do his conscience, this is no challenge at all, but lawful for him to do it.‡"

Actions brought either by the juror against either of the parties, or by either of the parties against him, which imply malice or displeasure, are causes of principal challenge; other actions, which do not imply malice or displeasure, are but to the favour.§

4. Challenges *propter delictum*, are for some Delictum. crime or misdemeanor that affects the juror's credit, and renders him infamous. As for a conviction of treason, felony, perjury, or conspiracy; or if, for some infamous offence, he hath received judgment of the pillory, tumbril, or the like; or to be branded, whipt, or stigmatized; or if he be outlawed or excommuni-

\* 2 Hawk. 43.

† Ibid.

‡ Co. Lit. 157.

§ Ibid.

cated, or hath been attainted of false verdict, *præmunire*, or forgery. And it hath been holden that such exceptions are not solved by a pardon. But it seems that none of the above cited challenges are principal ones, but only to the favour, unless the record of the outlawry, judgment, or conviction be produced, if it be a record of another court; or the term be shewn, if it be a record of the same court.\*

*Further, as to challenges for suspicion of favour;* although a juror has not given apparent marks of partiality, yet there may be sufficient reason to suspect he may be more favourable to one side than the other, and this is reason for a challenge to the favour. The causes of favour are infinite, and in these inducements to suspicion of favour, the question is, "whether the juryman be indifferent as he stands unsworn;" for a juryman ought to be perfectly impartial to either side,†.

**No challenge till a full jury.** There can be no challenge either to the array, or to the polls, before a full jury appears: If there be a defect of jurors, the party who intends to challenge the array, may pray a tales, and then challenge the jury. As the challenge to the array must be before *any* of the jury are sworn, so challenge to the *polls* must be before the *particular* jurors are sworn.‡

\* Ibid.—2 Haw. 43.—3 Black. Com. 363.

† Ibid.

‡ Bull. Ni. Pri. 8vo. Edit. 307.

After a challenge to the array, the party may challenge the polls, but after a challenge to the polls, there can be no challenge to the array; and he who has *more than one* cause of challenge against a juror, must take them all at once: but if he challenge a juror, and the cause be found insufficient, he may nevertheless afterward challenge him peremptorily, for perhaps the very challenge may create a prejudice in the mind of the juror so challenged.\*

A challenge to the array must be in writing, <sup>One chal-</sup> but a challenge to the polls is short and verbal. <sup>challenge in writing, the other ver-</sup>  
 A principal cause of challenge being ground-<sup>bal.</sup>ed on a manifest presumption of partiality, if it be found true, it unquestionably sets aside the array, without any other trial than its being made out to the satisfaction of the court, before which the panel is returned.

But a challenge to the favour, when the partiality is not apparent, must be left to the discretion of the triers.†

If the array be challenged, it lies in the <sup>How chal-</sup> discretion of the court *how* it shall be tried; <sup>lenges to be tried.</sup> sometimes it is done by two attorneys, sometimes by two coroners, and sometimes by two of the jury; with this difference, that if the challenge be for kindred in the sheriff, it is

\* 4 Black Com. 363.

† Trial per Pais, 172.

‡ Co. Let. 157.

most fit to be tried by two of the jurors returned; if the challenge be on account of partiality, then by any other two assigned thereunto by the court.\*

And when a challenge is to the array for favour, the plaintiff may either confess it, or plead to it; if he plead, the judges assign triers to try the array, which seldom exceed two, who being chosen and sworn, the clerk of the peace declares to them the challenge; and concludes to them thus, "*and so your charge is to inquire whether it be an impartial array, or a favourable one;*" and if they affirm it, the clerk enters underneath the challenge, "*affirmatur;*" but if the triers find it favourable, then thus, "*calumnia vera.*"†

As to a challenge to the polls; if a juror be challenged before any juror is sworn, two triers shall be appointed by the court; and if he be found indifferent, and sworn, he and the two triers shall try the next challenge; and if he be tried and found indifferent, then the two first triers shall be discharged, and the two jurors tried and found indifferent shall try the rest. But if the plaintiff challenge ten, and the prisoner one, and the twelfth be sworn, then he that remains shall have added to him one chosen by the plaintiff, and another by the Pri-

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\* 2 Hale's Hist. 275.

† Trial per Pais, 165.

soner, and they three shall try the challenge; and if six be sworn, and the rest challenged, the court may assign any two of the six sworn to try the challenges.\*

The truth of the matter alleged as cause of challenge must be made out by witnesses, to the satisfaction of the triers; also the juror challenged may on a *voir dire* (*Veritatem dicere*, to speak the truth,) be asked such questions as do not tend to infamy or disgrace.

But a juror is not to be asked whether he have been whipped for larceny, or convict of felony, and such questions as tend to discover matters of infamy or shame.†

In cases where the King is party, the Justices of gaol delivery, or of the Peace in Session, may reform the panels of jurors, by putting to, and taking out, the names of the persons impanelled, by their discretion; and if the sheriff do not return the panel so reformed, he shall forfeit 20*l.* half to the King and half to him that shall sue.‡

This act extends not only to panels of grand inquests, but also to panels of the petty jury.§

The challenges being now supposed to have been concluded, and the Jury full, the clerk of the peace calls the Jury to be sworn, every

\* 2 Hale's Hist. 275.

† Trial's per pais, 158.—Salk, 183. ‡ 3 Hen. 8, c. 12.

2 Hale's Hist. 186, 205.

man severally, and this is done in the following manner, calling the first juror :

Sworn.

“ You shall well and truly try, and true deliverance make, between our sovereign Lord the King and the Prisoners at the bar, whom you shall have in charge, and a true verdict give according to your evidence. So help you God.”

Then call the second juror, and so swear him in like manner, and so on to twelve, and neither more nor less.

The crier then counts the jurors, as the clerk of the peace reads their names, and asks them “ if they are all sworn.”

Then the clerk of the peace calls the prisoner named in the indictment, to the bar, and bids him hold up his hand, and then says to the jury: “ Look upon the prisoner, you that are sworn, and hearken to his cause.”

The indictment read. “ A. B. stands indicted by the name of A. B., &c. (*reading the whole indictment as he did upon the arraignment*) and then says, “ upon this indictment he hath been arraigned; upon his arraignment he hath pleaded not guilty; and for his trial hath put himself upon God and the country, which country you are; so that your charge is to inquire, whether he be guilty of this felony, whereof he stands indicted, or not guilty; if you find him guilty, you shall inquire what lands, tenements, goods, and chattels he had at the time

“ of the felony committed, or at any time since ;  
 “ if you find him not guilty, then you shall in-  
 “ quire if he did fly for it, or not ; if you find  
 “ he did fly for it, then you shall inquire what  
 “ goods and chattels he had at the time when  
 “ he did fly for it, or at any time since ;  
 “ if you find him not guilty, and that he did  
 “ not fly for it ; say so, and no more, and hear  
 “ your evidence.”

The reason of these latter words is, that if the <sup>Flight.</sup> jury find that the person accused fled, his goods and chattels are forfeited, upon the presumption that guilt is to be inferred from flight. It is not usual, however, now for the jury to find the flight.\*

The Court then proceeds to the examination <sup>Witnesses</sup> of witnesses upon their oath, first for the prosecution, and afterward for the prisoner ; and the oath is administered by the clerk of the peace in the following form :

“ The evidence that you shall give between  
 “ our sovereign Lord the King, and the Pri-  
 “ soner at the bar, shall be the truth, the whole  
 “ truth, and nothing but the truth. So help  
 “ you God.”†

Formerly it was a settled rule that no coun- <sup>Counsel,</sup> sel should be allowed to a Prisoner upon the <sup>how far al-</sup> general issue, on an indictment of treason, or <sup>lowed to an-</sup> <sup>ers.</sup> felonies, unless some point of law arose proper <sup>ers.</sup>

\* 4 Black Com. 387.

† Cro. Cir. Comp. 14.

to be debated;\* but of late years it has been usual to allow counsel to examine, and cross examine witnesses, and otherwise to assist such prisoners, as well for felonies, as for misdemeanors; with this difference however, that in felonies they are not allowed to address the jury.†

**Court bound to assist.** If no counsel attend for the prisoner, it is the duty of the court to examine witnesses for him, to advise him for his benefit, and to assist him in defending himself; taking advantage moreover of every obvious defect or irregularity in the proceeding of the prosecution, which may serve to acquit him; and above all, to hear patiently and favourably whatever defence he himself may think fit to make.‡

**Evidence.** Being now arrived at that stage of the proceedings when the testimony, both for the prosecution, and the Prisoner, is to be exhibited, it becomes necessary to take, at least, a general view of the whole law of evidence; but more especially of those parts of the system which particularly apply to criminal proceedings, and to parochial controversies; because such subjects comprehend the principal business of a Session of the Peace. This review must of necessity be cursory, to be consistent with the

\* 2 Hawk. c. 89.

† 4 Black. Com. 356.

‡ Dalt. c. 185.

plan of the work, and the last published treatise on the subject presents the best model for its formation.\* But first the witnesses are to be sworn to speak the truth, which is done by the clerk of the peace administering the oath to each of them successively.

“ The evidence, that you shall give between Witnesses  
oath.  
“ our sovereign Lord the King and the Pri-  
“ soner at the bar, shall be the truth, the whole  
“ truth, and nothing but the truth. So help  
“ you God.”

The first great comprehensive rule respecting evidence generally, which runs through the Best evi-  
dence neces-  
sary. whole system of English jurisprudence, is that, in all cases, both civil and criminal, the best evidence, of which the nature of the case admits, shall be required; and that in no cases, except a few which are *ex necessitate rei* taken out of the general rule, shall any of inferior authority be admitted.†

For if it appear that better evidence might have been produced, the very circumstance of its being withheld, furnishes a suspicion that it would have prejudiced the party in whose power it is, had it been so produced. On this principle it has been uniformly decided as a general rule, that the execution of a deed can only be proved by one of the subscribing

\* Peake's Compendium of Evidence, 4 Edit.

† Peake's Compend. 9.—Law. of Evi. 286.

witnesses. This however proceeds on the supposition that such one is alive, and his presence to be obtained; if either of these possibilities fail, the *next best* evidence becomes the best, and therefore admissible.\* What that may be, must depend on the circumstances of each particular case: sometimes it can in its nature amount to no more than strong presumption, as similarity of seals or hand writing, but still if it be the best evidence the case admits of, it is sufficient, subject to observation on its degree of probability and consistency.

Thus, if an original document of any kind be necessary in evidence, and it be in the adversary's hands, a copy must be admitted, because it is the *best obtainable* evidence, the better evidence being not obtainable by the party producing the copy, for its being in the adversary's hands, is positive proof that it cannot be given by the party offering the copy.†

*Two kinds equally good* It may indeed happen that a fact may be *equally* well proved through two different *media*, as for instance, the fact of a person being *rated* to a parochial rate, cannot be proved but by the production of the rate itself, *if obtainable*; but to prove that a person *possesses rateable property*, although the production of the rate might shew that he was actually *rated*

\* 3 Black. Com. 368.

† Bull. N. P. 294.—2 Term. Rep. 202.

for it, yet the rate itself is not absolutely necessary to shew the mere possession of property *liable to be rated.*\*

Having laid down these general rules, which are applicable to *every* description of evidence, we come next to the division of it into its different kinds; and the *first* great line of that division, is between *written or documental evidence, and oral or parol testimony.* These are again divisible into minuter distinctions, but first it is proper to observe, that oral testimony being most commonly applicable to trials for criminal offences, (the subject we are now examining) while written is principally called for on appeals respecting settlements, the former, which the law denominates *parol*, must be our first subject *Parol* of consideration. It presents itself in three points of view, viz. 1st, the *number*, 2dly, the *quality*, 3dly, the *obligation* of witnesses.

1. The common law did not require any *Number of witnesses* for the trial of any crime whatever, and therefore where it is not specially provided otherwise, one witness continues to be sufficient to convict an offender. The general rules upon this subject may be briefly given thus,

In treason, which works corruption of blood, *In treason.* two witnesses are required.† Where the con-

\* 15 East's Rep. 32.

† 7 W. c. 3.

viction does not work corruption of blood, one witness is sufficient.\*

**In perjury.** In perjury also two are, of course, necessary to give a preponderance; for otherwise it would only be oath against oath, and a jury would have a very doubtful right to conclude on the falsehood of that sworn by the defendant.†

**One witness generally sufficient.** But generally in all other offences (unless in a few instances by statute, and which are chiefly, though not *entirely* confined to summary convictions on disputes between masters and workmen in particular trades) one witness is sufficient to convict offenders of all descriptions before Justices either *in, or out of, Session.*

**Quality of witnesses.** 2. Generally all persons are capable of being witnesses who are of sane mind, and may be presumed to have a proper sense of the obligation of an oath.—For it is an universal rule in all criminal cases, that no testimony shall in any case, or under any circumstances, be admitted without oath.‡ Subject then to these rules: Infants, Aliens, Persons deaf and dumb, Jews, Mahometans, Gentoos, Scotch Covenanters, being respectively sworn according to their rules of faith, and modes of understanding it, are admissible witnesses.§

\* Leach. Cr. L. 39.

† Peake's Compend. 10.

‡ 2 Str. 700.

§ Leach. C. L. 114, 347.—Bull. N. P. 242.—Peake's Compend. 136.

But the general rule is best illustrated by considering the exceptions, which are reducible briefly to the following instances.

1. *Atheists*, because having neither hopes of reward, nor fear of punishment, no test or rule of faith can bind their consciences.

2. *Persons rendered infamous*. By which it is to be understood that a conviction, and therefore, much more an attainder, or judgment of *treason, felony, piracy, praemunire, perjury, forgery*, and also a judgment in *attaint* for giving a false verdict, or in *conspiracy* at the suit of the King, are good causes of exception against a witness, while they continue in force; for where a man is convicted of those glaring crimes, against the common principles of humanity and honesty, his oath is of no weight.

Also it was anciently held, that judgment for any crime whatsoever to stand in the pillory, or to be whipt, or branded, being in a court which had a jurisdiction, rendered the party infamous, and incompetent to be a witness; but the rigour of this piece of law is reduced to reason; for now it is holden, that unless a man be put in the pillory, *pro crimine falsi*, that is, for some crime which renders him infamous, as for perjury, forgery, barretry, conspiracy, or the like, it is no blemish to his attestation; for it is the crime, and not the punishment, that makes the man infamous.\* Thus where a man was con-

\* Bull. N. P. 291.—38 Geo. 3. c. 45. By which statute

**Barretry.** victed of barretry, though he was only fined, the Court held him incompetent;\* so also till a modern stat.† a person convicted of, and whipt for, petit larceny was incompetent, because he was rendered infamous. But as the law stands now, a person convicted of grand larceny is restored to his credit by being admitted to his clergy, and a person convicted of petit larceny by force of this statute. Besides which, a King's pardon will restore every man to his credit, except in the solitary instance of conviction for *perjury under the statute*, by which the power of pardon is specifically taken away.‡

**Conviction must be produced to impeach the credit of witness rendered infamous.** However, the party who would take advantage of any of these exceptions to witnesses, must be prepared with a copy of the record of conviction, to produce in Court, for otherwise the objection will fail.§ For it is a general rule, that a witness shall not be asked any question, the answering to which might oblige him to accuse himself of a crime: and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes, whereof he was never convicted.||

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fine and whipping are substituted for what is here denominated “branding,” which was marking the ball of the thumb with a hot iron, under a stat. of Hen. 7.

\* Salk. 690.

† 31 Geo. 3. c. 35.

‡ Bull. N. P. 292.

§ Ibid.

|| 2 Hawk. c. 46.

Neither are witnesses permitted to give evidence of their own infamy or turpitude.\* Thus, one was not admitted to swear, that he was suborned and perjured.†

But a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has a tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, that the answering such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, at the instance of his Majesty, or of any other person.‡

8. Persons *interested*. It is a general rule of evidence, that persons interested cannot be witnesses, and much nice discrimination is requisite for the perfect understanding of it, as it applies to the *competency* or *credit* of witnesses in civil actions; but as it is connected with criminal proceedings, a few examples will be sufficient, and even to some of these there are numerous exceptions, both by statute and otherwise.

In all public prosecutions for offences, where any advantage is certainly to arise to the Prosecutor, there he cannot be a witness, because it would be to attest in his own behalf; but where

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\* 4 Inst. 279.

† 3 St. Tri. 427.

‡ 46 Geo. 3. c. 37.



there is only a fine to the King, and nothing goes to the prosecutor, then he may be a witness.

So a person whose property may be prejudiced by a forgery, is no evidence to prove it on an indictment, because he has an immediate interest in the success of the prosecution.\*

**Exceptions.** Yet the person whose signature is forged may be *made* a competent witness to prove the forgery by being released from the payment.† So, if the money have been recovered from some other person, because then he is no longer interested, as it cannot be recovered twice.‡

And if the interest be not immediate, but remote, it will not prevent the party possessing it from being a witness, as is clear from a great number of cases respecting parish rates to be noticed very soon.§

**Husband and wife.** Husband and wife, generally speaking, cannot be admitted witnesses for, or against, each other, because their interests are the same ; but to this rule also there are many exceptions.

**Exceptions.** In the first place, it does not hold in high treason ; nor in abduction and forcible marriage ; nor in an indictment against the husband for polygamy (the second wife being absolved from all common interest with her husband, by the mar-

\* Law of Evi. 126.

† Leach. C. L. 159.

‡ Bull. N. P. 289.

§ Cald. Ca. 551.

riage being void); in breaches of the peace by the husband against her person; nor in indictments for assaults by other persons on the husband, for the King being the prosecutor, and the fine, if any, going to the King, no interest accrues to the husband, wherefore both himself and his wife are good witnesses.\*

But no other degree of kindred, or affection, as that of parent and child, or the like, will prevent a person from being a witness, but nevertheless such evidence is open to much observation.†

And there are cases, where, from the necessity of the thing, persons interested must be allowed to be witnesses: thus in removing an indictment by *certiorari* from the Sessions to the King's Bench; though the prosecutor in that case, if the defendant be convicted, is entitled to his costs, yet he is allowed as a witness; for if the giving of costs, should take off the evidence of the prosecutor, the act of Parliament designed to discountenance the removal of suits by *certiorari*, would give the greatest encouragement to them that is possible.‡

So shall the evidence of a man be received, though in case of conviction of the offender for

\* Prae. Expos. title, EVIDENCE, Sect. 8.—Peake's Compend. 193.

† 1 Salk. 289.

‡ 10 Mod. Rep. 193.

a robbery, he will be entitled to a reward of 40*l.* for the intention of the act of Parliament would be quite defeated, if the reward should take off the evidence.\*

**Parishioners** The parishioners or inhabitants of parishes, townships, and other places, were not admissible witnesses to prove the perpetration of such offences within their parishes, for which pecuniary penalties were inflicted, applicable to the use of the poor, till they were made so by a recent statute.†

But now it is provided by that statute, that the "inhabitants of every parish shall be deemed competent witnesses, for the purpose of proving the commission of any offence, within the limits of their parish; notwithstanding the penalty incurred by such offence, of any part thereof, may be given to the poor of such parish, or otherwise for the benefit or use, or in aid or exoneration of such parish; so as the penalty to be recovered shall not exceed the sum of 20*l.*"

And it is no objection to the testimony of an inhabitant of a parish who is liable to be rated to the relief of the poor, but not rated in fact, that he has an interest in the penalties to be recovered for the use of the poor, by his testimony, because that he may eventually be benefitted by the distribution thereof, and thereby

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\* Ibid.

† 27 Geo. 3. c. 20.

eased of a proportion in his assessment ; for the distinction now is, that where the inhabitant does not actually pay, his mere *liability* is that sort of remote interest that shall not take away his testimony.\*

But it has been decided that, a *rated* inhabitant is to all general purposes of his parish an interested, and therefore an incompetent, witness, insomuch that after a settlement proved by appellants in a *third* parish, a *rated* inhabitant of such *third* parish was held *not a competent witness* for respondents to disprove that settlement, for his interest in the judgment is direct ; as the order, if confirmed, would be conclusive evidence of settlement *at that time* in appellants parish upon subsequent order of removal from thence to such *third* parish.†

But on an appeal from an order of removal, the respondents may compel an inhabitant of the parish appealing, who is *not rated* to any of the parochial taxes, to be examined ; and they may also produce an inhabitant of their own parish, who is not rated, and the evidence of such inhabitant shall be received, " for," said the Court, " mere inhabitancy does not create interest."‡

It has been long settled, that it is no exception against a witness that he hath confessed

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\* Cald. Ca. 551.—4 Term. R. 17.—2 Bott. 756.—2 East's Rep. 559.

† 15 East's R. 471.

‡ 6 Term R. 157.

himself guilty of the same crime, if he have not been indicted for it; for if no accomplices were to be admitted as witnesses, it would be generally impossible to find evidence to convict the greatest offenders. Also it hath been often ruled, that accomplices who are indicted, are good witnesses for the King, until they be convicted.\*

Testimony of accomplices uncorroborated. But the bare uncorroborated testimony of an accomplice, has seldom been thought of sufficient credit, to put a prisoner upon his defence; however, the practice of rejecting an unsupported accomplice, is rather a matter of discretion with the court, than a rule of law; for the circumstance of his being an accomplice, goes to his credit only, and his evidence may be left with the jury, although it be entirely uncorroborated by any other testimony; and upon this principle there are instances of Prisoners having been convicted upon the evidence of an accomplice only.†

Co-Defendants in an information. Also it has been adjudged, that such of the defendants, in an information, against whom no evidence is given, may be witnesses for the others.‡

Three persons indicted for perjury. So if three persons be indicted for perjury, on three several indictments, and one pleads not

\* 2 Hawk. c. 46.

† Leach. C. L. 412.

‡ 2 Hawk. c. 46.

guilty, the other two may be witnesses for him on the trial, for they stand unconvicted, although they be indicted.\*

The attorney of *a party* ought not to be examined to any facts, the knowledge of which he obtained in his capacity of *such* attorney, because in that knowledge his employer has an interest confidentially communicated; but otherwise of facts which he obtained the knowledge of, previous to his having been so employed.† And the rule itself extends to no other persons whatever, but counsel and attorneys.‡

But few other observations relative to the *qualities* of witnesses, and those not reducible to the heads of *distinction*, *credit*, or *interest*, remain to be offered.

Excommunicate persons cannot be witnesses, because they are legally defunct;§ but outlaws may, for the outlawry has no influence upon their credibility;|| Quakers cannot be witnesses, because they will not submit to be sworn, and their affirmation cannot be taken in criminal proceedings;¶ a Justice upon the Bench, or a Juror, may give evidence either for the prosecutor or defendant; but it must be in

\* 1 Hale's Hist. 305.

† 7 East's Rep. 357.

‡ 4 Term Rep. 753.

§ Law of Evi. 146.

|| Co. Lit. 6.

¶ 7 and 8 Wm. 3, c. 34.

open Court, and not privately before the Bench or the Jury.\* Whatever witness is produced by either party, may be examined by the other, when he has concluded his evidence for the party who produced him.† A party cannot call one witness to disprove what another of his own witnesses has sworn.‡ Either party may make application to the Court to have the witnesses examined apart, that is, have all of them removed out of Court, and brought in one by one to be examined, and this permission is never refused.§

Obligation  
of witnesses  
to attend.

Recogni-  
zance.

Subpoena.

Habeas Cor- a writ of *habeas corpus ad testificandum*.||  
pus.

3. We now come thirdly, to the *obligation* under which witnesses are to attend and give their testimony. It has been observed in a former page, that a *recognizance* taken before the examining Justice, at the commencement of the usual proceedings in criminal accusations, is the most common method for compelling the attendance of the parties concerned in the prosecution, or the defence, at the time of trial; as also that, for compelling the attendance of all other persons not so bound to give their testimony, a *subpoena* from the clerk of the peace is the proper process. But when a witness, however, is in prison, or on board a ship upon duty, he must be brought up under

\* 2 Hawk. 46.      † 2 Bac. Ab. 296.

‡ 2 St. Tri. 746.      § 4 St. Tri. 9.

|| 44 Geo. 3, c. 102.—Peake's Compend. 510.

It is almost unnecessary to observe, that non-compliance with the terms of the obligation in the <sup>recognizance.</sup> Forfeiture of the recognizance, of course incurs the forfeiture of the penalty, under which the party bound by it undertakes for his appearance, and his performance of the other conditions annexed.

If any person, upon whom legal process shall have been regularly served from any court of record, to appear to testify or depose concerning any matter depending therein, having had his reasonable expences tendered to him, shall not appear according to the tenor of the process, he shall forfeit 10/. with reasonable recompense to the party grieved,\* and not only so, but be also subject to an attachment for a contempt.† By a recent statute,‡ power is given to any court, "where any person shall appear on recognizance or subpæna, to give evidence to any fraud, petit larceny, or other felony, whether any bill of indictment be preferred to the Grand Jury, or not, provided the person have in the opinion of the court *bond fide* attended in obedience to such recognizance, to order the treasurer of the county, riding, or division, to pay him such sum as they shall think reasonable, not exceeding his actual expences, beside making a reasonable allowance for time and trouble if he be

Expences allowed.

\* 5 Eliz. c. 9.

† 1 Black. R. 36.

‡ 18 Geo. 3, c. 19.

in poor circumstances, which order on the treasurer, shall be made out by the clerk of the peace for the fee of 6d. and no more."\*

**Regulations respecting expences to be made in Session.** The same statute further authorises the Justices of counties, cities, towns corporate, &c. at their respective Quarter Sessions, to make regulations respecting these expences, which are to receive the signature of one of the Judges.

Besides the tender of expences, it must also be remembered that a *subpoena* must be served in such time before the trial, that the witness shall have reasonable notice to prepare himself.†

**Written or documentary evidence.** We now come to written or documentary evidence.

Before we enter upon an enumeration of the documents themselves, that are to be classed under that description, let it be observed, that throughout this volume, the object of it is to impress upon the minds of learners, general principles, and common practice; not to enter into minute discussions, or to familiarize them with the recollection of particular cases by

\* This order, for the payment of the expences of the prosecutor and his witnesses, must, where the offence is committed, *within a district having a separate jurisdiction*, be made upon the treasurer of that district, and not upon the treasurer of the county or division, within which such district lies.—6 Term. Rep. 237.

† 1 Str. 510.—2 Str. 1150.

name; and therefore, although the variety of written instruments which may occasionally be made evidence, may fairly be denominated "infinite," the present article will not be extended beyond those which may probably come into common use in the trial of offenders, the adjustment of disputes respecting parochial rates, and the decision of cases of settlement, at the Quarter Sessions.

\* Confessions-(by which are *primarily* intended confessions made before the examining Justice, in the first instance, by the party accused) have always been considered in criminal cases, as of the highest and most decisive authority,\* but they are admitted only, subject to the following restrictions.

First, they can only be given against the parties making them, and not against any other.†

Secondly, they must be taken altogether, and not by pieces.‡

Thirdly, the identity of these confessions to be proved must be proved at the trial, before they can be read in evidence; and if they be not proved, they cannot be admitted orally; for a confession being the strongest proof of guilt, requires the highest authenticity, and must be

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\* Pract. Expos. *Title*, EXAMINATION, Sect. 3.

† 2 Hawk. c. 46.

‡ Ibid.

proved to have been made without menace or undue terror.

To be voluntary. But where it is free and voluntary, it is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt; and it is therefore admitted as proof of the crime to which it refers.\*

But confessions are received in evidence, or rejected as inadmissible, under a consideration, whether they are, or are not, entitled to credit: and a confession forced from the mind, by the flattery of hope, or by the torture of apprehension, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore confessions so extorted are rejected.

However, if any facts are discovered, in consequence of even *such* a confession, they may be given in evidence; because facts must be immutably the same, whether the confession, which disclosed them, be admitted or not.†

Other sorts of confession, as declarations to gaolers, and other persons, in prison, do not come under *this* view of the subject, and therefore are unnecessary to be considered here.

Other documentary evidence. Other descriptions of documentary evidence may be admitted, in a general view of the subject, as consisting of:

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\* 2 Hale's Hist. 285.—Leach. C. L. 249.

† Ibid.

1. Statutes of the realm, or acts of parliament. *Statutes.*  
Of these it is enough to observe, that "public acts" or acts relating to the general interests of the kingdom, or of any large portion of it, (as *ex. gr.* Bedford Level) or of the whole profession (as *ex. gr.* the body of the clergy) need not be proved further than by the production of the printed statute book. But that in the case of "private acts," or acts relating only to private persons, places, or interests, testimony must be produced of their having been compared with the parliament roll.\*
2. Proclamations, addresses, and the articles <sup>Proclama-</sup>  
<sup>tions, &c,</sup> of war, as printed by the King's printer, are considered as sufficiently proving themselves by their mere production.
3. The gazette published by the authority of Government, is generally sufficient evidence of any *act of state* or public matter so announced.† But the gazette is no proof of any *private matters* respecting individuals contained therein:‡
4. Upon the same general principle, the re- <sup>Navy office</sup>  
turns on the books of the navy office are sufficient, evidence that a person of a particular name is dead, but not of the identity of that

\* Peake's Compend., 26.

† Id. 84.

‡ 5 Term R. 436.

person, which, if doubtful, must therefore be proved by other evidence.\*

History.

5. General history may be given in evidence to prove a public matter relating to the government or kingdom *in general*, but not any *particular* custom, or other matter which affects the private rights of individuals. And even books of general history, as topographical works, are not admissible, on subjects of public history, if any documents, from which they were compiled are obtainable.†

6. Surveys and inquisitions taken on *public occasions* are evidence to ascertain the rights of individuals not named in them; but *only* when they have been taken under some *public* authority, and not by that of any private individual.‡

Almanacks.

7. Almanacks are good evidence to prove on what day of the week a particular day of the year fell, and such like events, for there can be no other evidence of such things.§

Records of Courts.

8. Records of the King's Courts prove themselves, and the rolls of Courts *not* of record, so far as they assert the *public* interest.|| But records of the King's Courts are only conclusive evidence, generally speaking, against those who are parties to them. Thus an accessory

\* 3 Esp. R. 190.—Peake's Compend. 85.

† Salk. 281.—Peake's Compend. 86.

‡ Peake's Compend. 91.

§ Cro. Eliz. 227.—3 Black. Com. 323.

|| 10 Co. 92.—Theory of Evi. 43.

may controvert the guilt of his principal, notwithstanding the record of his conviction.

9. Ancient terrars are, or are not, evidence, <sup>Terrars.</sup> according to the possession from which they come, and the parties by whom, and for whose interest, they are produced. Thus they can only, under very particular circumstances, be evidence *for* the parson, but may generally be evidence *against* him. But if they be signed by churchwardens appointed by the parish at large, and not by the parson, and whose interests were rather *against* him, than *with* him, they become good evidence, even of rights.\*

10. Ancient maps, like terrars, surveys, and <sup>Maps.</sup> other such instruments, are subject to the same observations. Their being admitted as evidence must depend on the circumstances under which, and the parties by whom, they were made, the purpose and interest for which they are produced, and the object to be supported by them,†

11. Corporation books, so far as they concern <sup>Corporation Books.</sup> the public government of a town, when publicly kept, and the entries made by a proper officer, are received as evidence of the facts contained in them.‡

\* Theo. of Evi. 44.

† Peake's Compend. 95.

‡ Id. 97.

Parish register.

12. Parish registers are evidence of the entries of births, marriages, &c. therein made, but subject to the proof of the identity of the parties, in the same manner as has been observed respecting the books of the navy office.\*

Herald's books.

13. The herald's books are good evidence of pedigree and such matters, but entries in them taken from records cannot be evidence, because the records themselves (or in cases hereafter to be noticed copies of them) might be obtained.

Inscriptions. And for numerous reasons, inscriptions on monuments and grave stones, are evidence of the same, subject to the common rules respecting proof of identity.†

Sentence of spiritual courts.

14. The sentence of the Spiritual Court on a subject within its jurisdiction is good evidence, as of the lawfulness of marriage.‡

Depositions generally.

15. In criminal cases, depositions are taken by virtue of the statute of 1 and 2, 1*h.* and *Ma.* c. 13, and 2 and 3, *Ph.* and *Ma.* c. 10. By the former of these, it is enacted, "that those persons who are brought before Justices for felony, and who are *bailed*; and by the latter, that those, who, under similar circumstances, are brought before them and *committed*: shall be examined touching the felony, and *their* examinations, as well as of those who bring

\* Peake's Compend. 92.

† 3 Black. Com. 105.—Theo. of Evi. 45.

‡ Peake's Compend. 45.

them, shall be put into writing." On these statutes, it has been holden, that in case of felony, if a magistrate take the deposition on oath of *any person in the presence of the Prisoner*, whether the party wounded or an accomplice, and the deponent die before the trial, the depositions may be read in evidence; but if the Prisoner be not present at the examination, it can duly be read as the dying *declaration* of a person in extremities; for the rule is universal, that where there was no opportunity for cross examination, a mere *ex parte* evidence although on oath, shall not be received as *strictly evidence*.\* It is to be observed too, that these statutes relate only to cases of *felony*, and therefore are not applicable (so as to make such depositions evidence) on any other cases.† Depositions before coroners, where the parties were in *extremis* and have died immediately after, have been received in trials for murder.‡ Where a pregnant woman died after examination, but before an order of filiation, such examination taken under the stat. 6 Geo. 2, c. 91, was holden *admissible* evidence, on an application to the Quarter Session, for an order on the father, and *uncontradicted* to be conclusive.§

\* Leach. C. L. 512.

† Nalk. 281.

‡ Peake's Compend. 63.—Cald. Ca. 482.

§ Ante this chap. *Title, BASTARDY, and 2 Bent's R.* 63.

**Examination of a pauper.** But the examination of a pauper, though committed to writing, and taken before two Justices, touching his settlement, is not admissible evidence of such settlement,\* any more than depositions in Chancery and other Courts, where, by the course of proceeding, there can be no cross examination.†

**Of a soldier.** However, by the annual mutiny act, it is made so now, with respect to soldiers, under certain restrictions, viz. that "if any non-commissioned officer or soldier shall have wife, child or children, two Justices may summon him where he is quartered, to make oath of the place of his last legal settlement, and he shall obey such summons, and make oath accordingly. And the Justice shall give an *attested copy* of such affidavit; to be delivered to the commanding officer, which copy shall be evidence, as to such settlement, &c. &c." on this statute making so material an inroad on the old determinations respecting evidence, it has been decided that, 1st, there can be only *one* attested copy in each case entitled to this privilege, viz. *that* which is delivered to the commanding officer; 2ndly, that this examination must be authenticated before it can be received in evidence, for it is not one of those instruments which proves itself; 3dly, that as a *copy* is de-

\* See *Prac. Expos. Title, Poor*, sect. 2, where most of the cases on the subject are brought together.

† 2 *East's Rep.* 54.

clared to be evidence, it follows that the *original* examination must be considered such.\*

16. If a deed be upon the face of it 30 years <sup>Ancient</sup> old or upwards, it may be given in evidence without any proof of the execution of it ; but some account of what custody it is produced from, and other circumstances to shew the fairness of the exhibition, may frequently be necessary to entitle it to unqualified credit. If there be any erasures or interlineations, or other circumstances to create any doubts, such circumstances also must be accounted for, in some way, to rebut the presumption of fraud or fabrication.†

17. It may be laid down as a general rule, <sup>Copies</sup> that as wherever original instruments can be obtained, no inferior evidence of their contents is admissible ; so it is an equally general rule that where the record, the contents of which are necessary to be given in evidence, is public property and cannot be obtained by subpœna or other process from the place where it ought always to remain ; or where, though private property, it is not produced *by the party possessing it, an attested copy*, or in such sorts of instances as Parish registers, Bankers' books, and other depositaries where the contents consist of separate entries, and concern different persons, at-

\* Pract. Expos. Title, Poor, Sect. 2.

† Bull. N. P. 255.

tested *portions of copy*, as extracts of the particular entries, are good evidence.\*

A few observations on the subject of evidence, as connected with both sorts, parol, and written, must conclude this part of the subject.

**Parol testimony not to be admitted against written evidence.** *Written* evidence is considered by the law as of so much higher a nature than *parol testimony*, that the latter is never admitted to contradict the former; never to controul it but where it is ambiguous; nor to explain it but where it is contradictory.†

**Not to the fact contained in the written.** And where both exist, and one is merely the transcript of the other as to the same fact, the written alone can be admitted: thus though the declarations of a person mortally wounded respecting his murderers, made upon the approach of death, be admissible from the necessity of the case, if those declarations were reduced to writing by the persons to whom they were made, that writing must be produced, and not the contents of it given *viva voce*. Thus also a witness may refresh his memory indeed by reference to any book or paper, but if that book or paper be the foundation of his knowledge, it must be produced, and not the parol testimony of its contents given.‡

Where written instruments are proved to have been burnt or lost, or where they are in adverse

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\* Peake's Compend. 91.

† Ibid. 112.

‡ 2 Term R. 749.

hands and cannot be obtained, parol testimony of their contents is admissible. Thus, where in an appeal against an order of removal, it appeared satisfactorily, that the order of removal and duplicate were lost, parol testimony of the existence and contents of such order were determined to be admissible.\*

Parol testimony must *ex necessitate rei* be Parol testimony of the medium of proof of hand writing, in sub<sup>hand writing</sup> descriptions to instruments and deeds of all kinds, necessary. for otherwise there could be no proof but comparison of signatures, which would not only be more uncertain evidence, but has been decided to be inadmissible.†

What a man, who is living, has sworn on one occasion, can never be given in evidence at another to support him, because it can be no evidence of the truth ; but if he has at one period sworn any thing, which at another period he has contradicted, such variation of testimony may be given in evidence to take off the effect of his testimony ; but if a witness examined at a former trial of any issue *between the same parties*, be dead, his depositions on that trial may be read on a subsequent one.‡

It is a general position in law, that hearsay Hearsay is no evidence ; for if the first speech were

\* 6 Term. R. 556.

† 2 Hawk. c. 46.—1 Ld. Raym. 39.

‡ 2 Peere Williams, 548.

without oath, an oath that such a speech was made, does not communicate the validity of an oath to the first bare assertion. To this general position however, we have seen there is at least one common exception in criminal cases, viz. in that of a person at the point of death from violence, declaring who were his murderers ; so there are exceptions, and those not few in number, in civil cases : for there are many on which it is the best evidence that the nature of the case admits. Thus in questions of legitimacy, the declarations of the parents and others of the family deceased, corroborating other evidence ; in questions of pedigree respecting the identity, residence, names of children, funerals, and other circumstances of relatives, which, at a great distance of time, are often not to be collected from any other source. Also in questions of prescription, as rights of way, the declarations of persons deceased who had no interest in the subject, are of material weight to shew the general reputation of the country.\*

Prisoner's address.

Having thus disposed of the evidence on both sides, the Prisoner is to be informed that if he has any address to make, it is the proper time so to do ; and it is the duty of the Justices and Jury patiently to attend to what he may offer.

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\* 1 East's R. 373.

When the Prisoner hath done, and been heard all that he has to say in his defence, the evidence is summed up by the Court to the jury;\* and if they cannot agree in their verdict at the bar, a bailiff must be sworn to keep them, thus :

" You shall swear that you shall keep this jury without meat, drink, fire, or candle ; you shall suffer none to speak to them, neither shall you speak to them yourself, but only to ask them whether they are agreed : So help you God."†

On the subject matter of this oath, which is thus directed to be administered to the bailiff, a few observations present themselves.

The jury must be kept together without meat, drink, fire, or candle, till they are agreed.‡

And so it is in all Courts, if the jury will not agree on their verdict, to keep them without meat, drink, fire, or candle, till they agree ;

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\* The Chairman of the Session, at least, is inexcusable if he do not take notes of the evidence on every subject which comes before the Court. In the events of removal by *certiorari*; of a special case being carried up to the Court above; of applications for pardons ; and on various other occurrences that may take place, the notes of the Chairman are the only proper record that can be referred to for ascertaining any fact, and the only criterion by which a judgment can be formed of any controverted point.

† *Dalt.* 185.

‡ *Co. Lit.* 227.

and the steward of an inferior Court may, from time to time, adjourn the Court till such agreement.\*

And it is fineable for the jury to eat, though at their own charge, after they are departed from the bar; though it may not avoid the verdict.†

But if any of the jury be ill, on special application to the Justices, they may be indulged with meat, drink, or whatever be necessary, at their own cost, or in any way that is not likely to influence their verdict; but it ought not to be at the expence of any of the parties to the trial.‡

If the juror continue ill, or die before verdict, the proceedings are as if they had never commenced, and a fresh inquest must be charged to deliver the Prisoner.§

But if any of them misbehave themselves after their departure from the bar; as where they do not all keep together, till they have given their verdict, or where any of them carrying any thing eatable with them in their pockets, eat or drink, or otherwise refresh themselves without leave from the Court, before they have given their verdict, they shall be punished by fine.||

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\* Salk. 201.

† Bull. N. P. 308. — 4 Black. Com. 361.

‡ Dr. and Student, 158.

§ Ibid. || 2 Hawk. c. 22.

If after their departure they desire to hear Additional examination of witnesses again, it shall be granted, so he deliver his testimony in open court; and also they may desire to propound questions to the Court, for their satisfaction, and it shall be granted, so it be in open Court.\*

If the jury say they are not agreed, the Court cannot be discharged but by consent. They are fineable; but a jury sworn and charged in a capital case cannot be discharged (without the Prisoner's consent) till they have given a verdict; and that must be given also openly in Court.†

As to trials going off for want of jurors, by means of drawing a juror, it seems, 1st, That in capital-cases a juror cannot be withdrawn, though all parties consent to it. 2ndly, That in criminal cases not capital, a juror may be withdrawn, if both parties consent, but not otherwise. 3dly, That in all civil causes a juror cannot be withdrawn, but by consent of all parties.‡

After the verdict is recorded, the jury cannot vary from it, but before it be recorded, they may vary from the first offer of their verdict.

\* 2 Hale's Hist. 296.

† Ibid.

‡ 2 Hawk. c. 47. — Fost. C. L. 22.

§ Carthew's R. 463.

and that verdict which is recorded shall stand.\*  
 Special verdict. But they may give a special verdict in any criminal case, whether capital or not capital, as well as in a civil. As if one be indicted for grand larceny, that is for stealing goods *above* the value of 12*d.* yet the jury may find specially that he is guilty, but that the goods are not above the value of 12*d.* in which case he shall only have judgment for petit larceny.†

Cannot cast lots for verdict. If the jurors differ and cast lots for their verdict, although it may be according to the evidence, and the opinion of the judge, they shall be fined for the contempt.‡ But the Court cannot receive an affidavit from any of the jurymen, that the jury were divided in opinion, and tossed up, in all of whom such conduct is a very high misdemeanor; but in every such case the Court must derive their knowledge from some other source; such as from some persons having seen the transaction through a window, or by some such other means.§

Jurors when punishable for other contempts. Jurors are likewise punishable for sending for, or receiving instructions from, the parties, concerning the matter in question, and therefore much more for receiving a bribe.

So if a juryman have a piece of evidence in his pocket, and after the jury sworn and gone

\* Co. Lit. 227.

† 2 Hawk. c. 47.

‡ 1 Str. 642.

§ 1 Term R. 11.

together, he sheweth it to them to influence their verdict, it is a misdemeanor fineable in the Jury; but it avoids not the verdict.\*

But it is no offence in a juror merely to exhort his companions to join him in such a verdict as he thinks right; and generally, it seems Not punishable in criminal cases, but for direct contempt. certain, that no one is liable to any prosecution or punishment whatsoever, in respect of any verdict given by him in a criminal matter, adhering only to these plain rules, of justice and decency. For since the safety of the innocent, and punishment of the guilty, so much depend upon the fair and upright proceedings of jurors, it is of the utmost consequence that they should be as little as possible under the influence of any passion whatsoever; and therefore lest they should be biassed with the fear of being harassed by a vexatious suit, for acting according to their conscience, the law will not leave any possibility for a prosecution.†

When the Jury are agreed on the verdict, the Recording clerk calls them by their names, and asks them the verdict. "if they are agreed in their verdict, and who shall say for them?" and calls the first Prisoner to the bar, and bids him hold up his hand. Then says to the Jury, "Look upon the Prisoner, "you that are sworn, what say you, is A. B. guilty of the felony whereof he stands indicted "or not guilty?" If they say *guilty*, then the

\* Hale's Hist. 306,

† Hawk. 22.

clerk asks them, “ what lands or tenements, “ goods or chattels, he, the Prisoner, had at the “ time of the felony committed, or at any time “ since ?” The Jury’s common answer is, “ None to our knowledge.” When the Jury say, “ *not guilty*,” then the clerk asks if he, the Prisoner, “ did fly for it, or not ?” If they find a flight, it is recorded ; but their common answer is, “ Not to our knowledge.”\*

And so the clerk proceeds to every Prisoner particularly, which the Jury hath in charge, writing after the words *po. se.* over the several names of the Prisoners, *guilty* or *not guilty*, as the verdict is ; and then says to the Jury, “ Hearken to your verdict as the Court record- “ eth it ; you say A..B. is guilty of the felony “ whereof he stands indicted, and that he hath “ no goods nor chattels ; that C..D. is not “ guilty,” and so of the rest ; and then concludes, “ and so you say all.”†

Sentencia  
passed.

Then make a proclamation thrice, beginning with O yez, and say “ all manner of persons are “ commanded to keep silence whilst judgment is “ given against the Prisoner at the bar, upon “ pain of imprisonment ;” then set the Prisoner to the bar, and give the sentence.‡

\* Cro. Cir. Comp. 15.

† Ibid.

‡ In a book professedly compiled for the use of persons who have not been in the habit of considering such kinds of subjects, it may, perhaps, be deemed at least a pardonable piece of

When the trials of felonies, trespasses, &c. Vagrants. are concluded, it is usual to dispose of the vagrants, and those who are to be conveyed by vagrant passes.

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presumption in its author, if he throw out a few suggestions on that portion of the Justice's public duty, in the exercise of which, the law has left the *most* to his *discretion*, with the *fewest* means of regulating his *judgement*, viz. the punishment of those offences which are the usual subjects of trials before a Court of Quarter Session. Where statutes have conferred upon individual magistrates, or even upon Sessions, the authority of summary convictions without the intervention of jurors, they have limited the penalties for the offences created, or punished, by them, within *narrow generally*, but *always* within *prescribed* bounds; while with respect to fines, imprisonment, pillory, and even transportation, they have, of necessity perhaps, left to them the *same* latitude of apportionment, as to the judges of the superior Courts, although persons without the same professional experience, the same familiar acquaintance with the multiplied inducements to the commission of crimes, or the same means of discrimination respecting the effects of punishment. The present purpose is therefore to impress upon the minds of those who are only commencing their career in the public duties of magistracy, not merely the Justice and humanity, and therefore the duty, but even the policy also of exercising the most unprejudiced and temperate discrimination in the distribution of punishments, on account of the salutary consequences which may reasonably be expected from it. The punishments ordained by municipal regulations, may not improperly be designated by the epithets "admonitory," "exemplary," and " vindictive." To discriminate further than this might perhaps incur the imputation of fanciful refinement; but thus far, it may not be too much to insist, the first suggestions of common sense, and common benevolence need not wait for the saction of experiment;

When any vagrant shall be committed to the House of Correction "till the next Session," and the Justices at such Session shall, on the examination of the circumstances of the case, adjudge such person to be a *rogue and vagabond*, or *an incorrigible rogue*, they may order such rogue or vagabond to be detained in the House.

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for they are to be found in the very rudiments of civilization. To the novice in delinquency, punishment is intended primarily to operate as an individual admonition; and where the heart has not been absolutely depraved, but only the passions excited, or the temerity of youth stimulated by excessive temptation, or the influence of bad example; it will frequently have its due effect, if administered with that moderation, which corrects, without degrading. *Nemo repente turpissimus*, is an adage, as true in point of fact, as necessary to be kept in mind by those, whose rank and duties call upon them to mark with precision of punishment, the deviation of ignorance and frailty from the path of rectitude. On a repetition of offences, where it is ascertained, indeed, that admonition has failed to correct, to deter, by making the culprit an example becomes a duty to society: for compassion to the individual may then well give way to the general protection of the social system. Nevertheless, till amendment has become entirely hopeless, the severity of punishment should be short of that which cuts off all retreat from an association with the vicious. The third, and last, stage of depravity is that alone in which moderation may cease to be considered as an attribute of Justice. In that extremity, society has an ample right to manifest its resentment; and the administrators of its laws are justified in becoming the ministers of its wrath; because cutting off (by death or disgrace), the morbid member from the general body, becomes the only method of preventing the communication of contagion.

of Correction, to hard labour for any further time not exceeding six months; and such incorrigible rogue for any further time not exceeding two years, nor less than six months; and during the time of *such person's\** confinement, to be whipped in such manner and at such times and place, as they shall think fit; and such person may, if the Session think convenient, afterward be sent away by a pass; and if such person being a male, is above the age of 12 years, the Court may, before he is discharged from the House of Correction, send him to be employed in his Majesty's service by sea or land;† and if such *incorrigible rogue* so ordered by the Session to be detained in the House of Correction shall break out or make his escape, or shall offend again in like manner, he shall be guilty of felony, and be transported for seven years ‡

“ But if on examination, no place of settlement, to which such vagrants may be sent, can be found, the Session shall order them to be detained and employed in the House of Correction until they can provide for themselves, or until the Justices in Session can place them in some lawful calling as servants, apprentices, soldiers,

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\* The words “such persons” refer to all the descriptions of vagrants mentioned in the clause 5 East's R. 339.

† The particular service must be specified.—*Ibid.*

‡ 17 Geo. 2, c. 5, sect. 9.

mariners, or otherwise, either within this realm, or in the plantations in America.”\*

Convicts,  
&c. to be  
conveyed  
by passes.

Moreover, “any Judge of Assize, or Justices in Session, or any Justice of the Peace, may order any convict upon his discharge from prison, and also any person who shall be acquitted at the Assizes or Sessions, discharged by proclamation or otherwise, to be conveyed by a Vagrant Pass as directed by 17 Geo. 2, who shall by himself or any other person, apply to such Court, or Justice, to be so conveyed; and the Judge, Justices, or Justice, aforesaid, shall certify in such Pass, that the person so conveyed was discharged from prison, or acquitted, or otherwise discharged, at the Assizes or Sessions, as the case may be, for which Pass no fee shall be paid.”†

Transporta-  
tion.

A few words on the subject of transportation shall close this division of the chapter.

Transportation was unknown to the common law, and introduced by statute only, about the end of Queen Elizabeth’s reign, and continued for the purpose of colonizing newly discovered, or conquered settlements. It is now confined to three cases, 1st. voluntary under a stat. of Geo. 1. 2ndly, by way of commutation to escape a more severe punishment, and therefore *to a certain degree voluntary*.—3dly, by force of some

\* Id. sect. 28.

† 32 Geo. 3, c. 45, sect. 4.

modern statute, as the specific punishment of some particular offence. Voluntary transportation is, "where any person of the age of fifteen years and under twenty-one, shall be willing to be transported, and enter into any service in any of his Majesty's plantations in America, it shall be lawful for any merchant, or other, to contract with him for such service, not exceeding eight years; provided such person binding himself, come before the Lord Mayor of London, or some other Justice of the City, if such contract be made there, or before two Justices of Peace of the place where such contract shall be made, and acknowledge his consent, and sign such contract in their presence, and with their approbation; and such merchant or other may transport such person, and keep him in any of the plantations, according to such contract; which contract and approbation of such magistrate shall be certified by such magistrate at the next Quarter Session, to be registered by the clerk of the peace, without fee."\*

Transportation, as a commutation for a more severe punishment is, "where any person shall be convicted of grand or petit larceny, or feloniously stealing of money or goods, and who by law shall be entitled to the benefit of clergy, and liable only to burning in the hand or whipping (except persons convicted for re-

ceiving or buying stolen goods, knowing them to be stolen,) it shall be lawful for the Court before whom they were convicted, or any Court held at the same place with like authority, (or any subsequent Court held with like authority for the same county, &c. though held at another place,) instead of ordering such offenders to be burnt in the hand or whipped, to order that they be sent to *some of his Majesty's plantations in America for seven years*, and such Court shall have power to transfer such offenders, by order of Court, to the use of any person and their assigns who shall contract for their performance of such transportation for seven years,

*For offences excluded clergy.* And where any persons shall be convicted of any crimes, for which they are excluded the benefit of clergy, and his Majesty shall extend mercy to such offenders on condition of transportation, and, such intention of mercy be signified by one of the principal secretaries of state, it shall be lawful for any Court, having proper authority, to allow such offenders the benefit of a pardon, and to order the like transfer to any person (who will contract for such transportation) and to his assigns, of any such offenders, *as also of any person convicted of receiving stolen goods, knowing them to be stolen*, for fourteen years, if such condition of transportation be general, or else for such other term as shall be made part of such condition; and the persons contracting or their

designs, shall, by virtue of such order of transfer, have a property in the service of such offenders for such term of years."\*

These provisions have been amended by many subsequent statutes, but this of Geo. 1, remains the foundation of all modern transportation. The first of these amendments was by a stat. passed soon after the accession of the King, by which, the time of transportation was accelerated after reprieves, in cases of felonies excluded the benefit of clergy, by Judges of the Assize.

By another, passed after no great interval of time, those parts of the former statutes which ordained transportation to America, to be *part of* the sentence of transportation, were superseded by a provision, that the sentences in future might be "*to some parts of his Majesty's dominions beyond the seas,*" generally, and not confined to the American plantations, many of which were no longer under the controul of Great Britain:† so that now the usual style of

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\* Id. and 6 Geo. 3, c. 23; which act, last referred to, was, by the 24 Geo. 3, c. 56, altered and amended, in many particulars, especially in protecting the persons conveying the transports to the port of embarkation, in allowing a property in their service, to be assigned to contractors for them, without giving security for transportation, &c.

† 8 Geo. 3, c. 15.

‡ 19 Geo. 3, c. 74.—enlarged and extended by 35 Geo. 3, c. 18, and 39 Geo. 3, c. 45.

the sentence of transportation, runs “*to such of his Majesty's dominions beyond the seas, as he shall direct and appoint.*”

Next, it was enacted, that hard labour in places of confinement, might in some cases be substituted for transportation, and many statutes have been successively enacted to regulate these receptacles.\*

Three statutes have been very recently passed† for correcting the errors, and enlarging the benefits, of many of the former ones, on the subject of transportation, and the temporary confinement of offenders, of which the substance, so far as is necessary for our immediate purpose, is as follows:—The first of these, after reciting an Act of the 43 of Geo. 3, on the same subject, provides for the tonnage and admeasurement of all vessels carrying passengers to any of his Majesty's plantations and settlements abroad. The next, after reciting those of 19 Geo. 3. c. 74.—24 Geo. 3, c. 56. and noticing others which had been, from time to time, made to amend and continue these, for the transportation of offenders, as well as for the confinement of them in places appropriated for these purposes, continues them to March 25, 1814. The last mentioned further continues the Act immediately preceding, till 25 March,

\* 15 Geo. 3, c. 74.—24 Geo. 3, c. 56.—31 Geo. 3, c. 46.

† 53 Geo. 3, c. 36.—53 Geo. 3, c. 39, and 54, Geo. 3, c. 30.

1815, and to the conclusion of the then next Session of Parliament.

## SECT. II.

HAVING dismissed the other business of the Appeals Court, we come to the consideration of Appeals. The most cursory acquaintance with any book on the office and duties of a Justice of the Peace, must be sufficient to impress a conviction, that it would be a most unprofitable labour to introduce, under this division, all the subjects indiscriminately, on which an Appeal lies to the Sessions, from the decisions or acts of individual Magistrates. No part of the whole system can exhibit a better proof of this position than that which embraces the differences between masters and their workmen in most of our trades, which are respectively regulated by an immense number of statutes, many of which are very rarely called into use, but all of which are to be met with in books of the kind which have been alluded to, as occasion may require. It is proposed, therefore, to confine what is advanced *here* on the subject of Appeals, to those which arise out of that most ordinary and fruitful source of them, "the poor laws."

This resolves itself into two heads;—1st. the *Poor laws*, settlements of paupers;—2dly. the rates upon property for their support. These are the two great fountains of litigation respecting the poor laws, by Appeal to the Quarter Sessions: First, then, as to the *settlements* of paupers; these

Settlements  
by birth.

are obtained simply by birth, *or* through the medium of some modification *or* other of inhabitancy.\* This general rule of law is, that the place of birth is the *prima facie*, natural, place of settlement of every child; subject nevertheless, first, to certain exceptions; and secondly, to what may be denominated, in contradistinction to its *natural*, an *adventitious* settlement, derived from its parents, *or* acquired by itself. Out of these exceptions; *or* from the accession of these acquired settlements, must arise all the doubts or difficulties which give occasion to appeals. The exceptions apply particularly to illegitimate children, *or* bastards; because, generally speaking, they are the only children to whom an *adventitious* settlement, derived from that of one, *or* the other, of their parents, does not immediately accrue.

Place of  
birth the  
settlement  
of bastards.

Exceptions.

Child born  
after order  
of removal.

With respect to **BASTARDS**, then, it may be stated as an universal proposition, that the place of their birth, is that of their settlement, except,

1. Where there has been any collusion or contrivance to throw a burthen on the parish, for then the fraud will vitiate the transaction, and prevent the design.

2. Where the child is born of a woman under an order of removal; whether before actual removal, *or* in *transitu*, *or* during a suspension of the order.

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\* See Pract. Expos. title, Poor. Sect. 1.

3. Where an order of removal is reversed ; Order reversed for then all things happening subsequent to <sup>sed.</sup> such order, are avoided thereby.

4. when the child is born of a mother in a <sup>In</sup> vagrancy. State of vagrancy.

5. When born in a gaol or house of correction, In prison, &c. or in a house of industry incorporated by statute, or in a lying-in hospital.

6. When born of a mother residing in a parish where she is not settled, under the authority of the Friendly Society act. During residence under friendly society act.

7. When born of a mother residing under a certificate which includes the child specifically by description. Comprehended in a certificate.

If a bastard, then, be removed to the place of its birth, before it has acquired a settlement of its own, the only good ground of Appeal against such order, must be by shewing that it was born under such circumstances as are comprehended in one or other of these exceptions.\* And in the event of such case being made out, it will belong to the place of its mother's settlement.

With respect to **LEGITIMATE CHILDREN**, or Of children children born of married parents, supposing those parents to have no place of settlement, upon the principle before advanced, the place of the child's birth will be that of its settle-

\* See Pract. Expos. *title Poor*, where most of the authorities are adduced which support these various exceptions, and form the system.

Have pa-  
rents settle-  
ment.

ment; because *prima facie* that is the settlement of *every* child till another be discovered; but every legitimate child, or child born in wedlock, is entitled to its father's settlement if he have one, and if he be a foreigner and have not one, to its mother's, if she be a native and have one. Such is the general rule with respect to legitimate children, but to this also there are some exceptions, though by far less numerous than in the case of bastards.

Exceptions.

Born in vag-  
rancy, and  
mother dy-  
ing.

1st. If a legitimate child be born in a state of vagrancy, and the settlement of either of its parents cannot be found, by reason that the mother died in giving it birth, or other cause, it must belong to the parish wherein it was born, till they can discover a derivative settlement.

Foundlings.

2dly. In the case of foundlings or deserted children, maintained in an hospital founded and endowed for that purpose, and regulated by statute.\* *Foundling, ex vi termini*, seems to imply ignorance of origin, and consequently of derivative settlement; the general rule, therefore, before exhibited applies, with only the difference enacted by the statute, which is nothing more than transferring the burden of maintaining these children from the overseers of the poor where the hospital is situate, to the special provision of the hospital itself.

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\* 13 Geo. 2, c. 29.

Having thus noticed the general rule respecting derivative settlements, we come next to some applications of it, tending to show its universality; and then to consider how derivative settlements are superseded by acquired ones, as this is the most fruitful source of appeals to the Quarter Sessions.

The position advanced, being, that the settlement of the father is the settlement of his legitimate child, the corrollaries from this proposition are:

1st. That *proofs* of the father's settlement are sufficient to establish the settlement of the child, *if nothing appear to the contrary.*\*

And such a personal right is this in the Father's ~~attainder~~ children to their father's settlement, that it is not defeated by his attainder;† nor by the removal of his residence;‡ nor by the change of his (the father's) settlement, for the child's <sup>settlement of father,</sup> shall follow it *toties quoties*;§ nor by the father's death, &c. either's death either before, or after, the birth of the child.||

2dly. That no recourse shall be had to a Father's <sup>settlement always to be preferred to the mother's</sup> secondary claim of settlement (for example the mother's) till the primary one, viz. the father's, has been traced back so far as it will go. On <sup>however derived.</sup>

\* 6 Term Rep. 56.—2 Bott. 31.

† 6 Term Rep. 116.—15 East's R. 463.

‡ 2 Ses. Ca. 150.

§ 3 Salk. 269.

|| 19 Vin. 382.—2 Bott. 19.

this principle it was determined, that children had the settlement of their father, though a derivative one, from *his* mother, who had married a foreigner without settlement, in preference to an acquired one of their own mother.\*

Proof of any settlement in the father failing, the mother's settlement must be next resorted to. And it matters not whether such settlement of the mother (none being discoverable in the father) were by her birth, derivative from her parents, or acquired by herself, either during the life of her husband, or subsequent to his decease.†

Mother's settlement resorted to in failure of father's.

How far the settlements of children derived from their mother, change with her change of settlement.

We have seen that the settlements of children derived from their father, change with his. Settlements derived from the mother also change with hers, while acquired by her in her own right, either as the wife, or the widow, of a husband having no settlement; but if after the death of such husband, she marry a man with a settlement, and thereby partake of his settlement, she does not communicate such second husband's settlement to the children by her former husband.

Emancipation.

We come next to consider what acts of the children defeat their derivative settlements, or as it is termed, amount to **EMANCIPATION**.

\* Burr. S. C. 482.

† Burr. S. C. 367.—2 Bott. 26 and 28.

‡ Cald. Ca. 10.

A legitimate child shall *necessarily* follow the settlement of one, or the other, of its parents, as requiring nurture, till it be seven *years of age*, and *therefore as part* of the parents family; but after *that* age it shall not be removed at part of the parents family, but by an express adjudication of the place of its own legal settlement, whether it still retain its derivative one, or not. The reason of this is, that, at seven *years of age*, a child may be put an apprentice, and has therefore itself a capacity to acquire a settlement. So that at seven <sup>earliest</sup> years and forty days a child *may* have defeated <sup>period to gain an acquired settlement.</sup> its derivative settlement, and acquired a personal settlement of its own. These personal settlements may be obtained by a great variety of methods, as apprenticeship, hiring and service, marriage, renting a tenement, possessing an estate, serving an office, &c. But a child may also be emancipated from its parents, without having obtained any new settlement for itself, or having done any thing to supersede its original derivative one. The cases which govern this head of law are extremely numerous, but the criterion by which the fact of emancipation is to be collected from them, is as follows;—“Ordinarily,” said Lord Kenyon, “one of these things must happen,—either a child must have obtained a settlement for himself, or he must have become the head of a family, or at all events, must have arrived at <sup>Emancipation, how produced.</sup>

that age when he may set up in the world for himself, having contracted some relation, which is inconsistent with the idea of being under the controul of, or in a subordinate situation in, his father's family."\* And, in a subsequent case, the same Chief Justice laid down a rule, which, he observed, would reconcile all the cases on emancipation, in these words:—"If a child be separated from his or her parents, and without obtaining any personal settlement, return to the parents during the *age of pupilage*, such child remains part of the parent's family; but if when, by estimation of law, a child wants no further protection from the parents, and removes from them, such child shall not, *for the purpose of* a derivative settlement, be deemed part of the parent's family."†

Acquired APPRENTICESHIP appears to be the earliest settlement; mode by which an adventitious, or personal, and *first by* apprentice settlement can be acquired. It has been already observed, that the limit of age of nurture has been fixed at seven years, and by a statute of Queen Eliz.‡ at that period the children of the *poor* may be even *compelled* to go into apprenticeships.

\* 3 Term. R. 114.—Id. 355.

† 2 Bott. 46.

‡ 43 Eliz. c. 2.

By a previous stat. at the very commencement of the same Queen's reign, the qualifications of persons entitled to take, and to become, apprentices, had been regulated. Efflux of time, and the progress of commerce, however, had made many of its provisions inconvenient, and had occasioned many of its restrictions and penalties to fall into disuse ; wherefore they were repealed by the 54th of the present King, chap. 96, and are unnecessary to be further noticed here ; especially as, by the third section of the last mentioned statute, all the power and authority relative to apprenticeships is reserved to the Justices *generally*, as had been given to them *specially* over apprenticeships contracted by the authority, and regulated by the restrictions, of this repealed statute of Elizabeth,

The contract itself, by which the relation of master and apprentice is formed ; the residence under it, and the effects of that residence ; the premature conclusion, and the evidence to support, or to annul, such contract ; severally give occasion, to numerous Appeals. A few observations therefore on each of these particulars ; and first, of

#### *The Contract itself.*

1st. The contract may be made by any person more than seven years of age for *him*, or *her* self, (for being evidently and invariably supposed to be for the child's benefit, it is a

case out of the common rule of law, which makes the contracts of infants void.)

May be made by an infant. And the other contracting party, the master, may also be an infant.† And it is perfectly immaterial what is the trade or occupation.‡

Infant must always be a consenting party, excepting paupers. 2dly. Except in the case of parish apprentices, even if the contract be not the sole act of the parties who are to stand in the relation of master and apprentice, it is absolutely necessary that they should both be *consenting* parties, in order to obtain a settlement by the service under the contract. The proof of that consent, in the apprentice, is his signature, testifying his consent, without which the contract is not a valid contract to confer a settlement.§ But the signature of the master is not absolutely necessary, because his accepting the apprentice is proof sufficient of *his* consent.||

Signature of the master not essential.

Parol contract void.

Will not ensue as a hiring.

3dly. The contract must be a written one, and not by parol.¶ For a parol contract for an apprenticeship *so nomine*, is void as an apprenticeship, and it cannot be converted into a hiring, so as, with a service under it, to confer a settlement.\*\*

\* 1 Bott. 613.—2 Bott. 363.

† 4 Term. R. 196.—377.

‡ 1 Bott. 610.

§ 8 East's R. 25.

|| 2 Bott. 267.—371.

¶ 5 Term. R. 153.

\*\* 2 East's R. 298.—4 Term. R. 170.

4thly, It must be stamped with the proper Stamps necessary stamps, as regulated by statutes,\* of which there are two descriptions; one in respect of the instrument, as such; the other in respect of the fee or sum given, as a consideration with the apprentice. And the deed or indenture cannot be produced in evidence of the fact of apprenticeship, unless it be stamped with the proper stamps.†

5thly. The full sum or consideration given, must be set forth in the indenture, in words at length, and the duties paid on it;‡ and thissed in words provision is not to be evaded by giving other things instead of money.§

These are the principal points of form on which settlements by apprenticeship, in the ordinary course, are usually resisted, upon Appeal to the Quarter Sessions. The apprenticeships of *the poor exclusively* fall under a different consideration, so far as respects the contract itself, and therefore are necessary to be noticed, before we proceed to consider the effects and consequence of contracts of apprenticeships generally.

Thus apprentices bound out under the provisions of any public charity are exempt, from stamp duties.

\* 6 Term R. 317.—1 East's R. 55.

† Burr. S. C. 198.—2 Bott. 449.

‡ Stat. 8 Ann. c. 9.

§ 48 Geo. 3, c. 98.

by the statutes imposing them, from the duties payable on the consideration money.

And *parish* apprentices being bound out under the provisions of a particular statute for that purpose,\* the contract must be conformable with the particular directions of the statute itself, and subsequent ones passed to amend it, which are :

1st. That the binding *must* be by the majority of the churchwardens and overseers of the parish to which the pauper belongs.†

2dly. That the children must belong to parents whom the churchwardens and overseers shall judge not able to maintain them.

3dly. That boys shall be bound till 21, and girls till 21, *or marriage*.

4thly. That two Justices, having jurisdiction, must be assenting parties to the indenture, and being a judicial act, must be together at the time of assenting.‡

5thly. That such apprentices may, by the assent of two such Justices as aforesaid, be assigned ; and such assigned apprentices, shall be subject, to all such regulations as if they had

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\* 43 Eliz. c. 2.

† For the explanation of the words " majority of churchwardens and overseers," See 51 Geo. 3, c. 80. and also 54, Geo 3, c. 107, and Pract. Expos. *Title Poor, settlement by apprenticeship.*

‡ 3 Term R. 380.

continued to serve under the original indenture.\*

*The residence under the contract, and the effects of it.*

The settlement of an apprentice does not *Residence*, necessarily depend on the *settlement of the master or mistress*, but on his *own residence* during his apprenticeship in the actual service of such master or mistress. Thus where an apprentice works in the day-time with his master in the parish of A. but sleeps in the contiguous parish of B. where his home is, B. is the place wherein he obtains his settlement under the indenture.† Because the place where a person *lodges* is always understood to be the criterion of *residence*.†

But, as has been observed, the residence *Must be in the service of the master*; for the words of the stat. creating this species of settlements " *binding and habitation*" must be understood of an habitation *referable in some way to the apprenticeship*.|| Therefore it has been decided that if an apprentice, on account of illness, go into another parish than that in which his master lives, merely as a temporary residence to get cured, without performing

\* 32 Geo. 3, c. 57.

† Burr. S. C. 569.

‡ 11 East R. 176.

§ 3 Wm. c. 11. || 7 East's R. 363.

*any sort of service for his master during such residence, a settlement is not gained there by such temporary residence in such other parish.*

**Residence for 40 days necessary.** Forty days is, in all cases, the residence necessary for gaining a settlement, which is by inference, from the statute making settlements depend on residence; for it enacts, "that church wardens and overseers may obtain the removal of any person coming to inhabit and not repining to the amount of 10*l.* per annum, upon complaint to the Justices *within forty days after such persons shall have so come to settle;*"† the necessary inference from which is, that, *after a residence of forty days, such removal shall not take place, or in other words a settlement will have been gained; and by a subsequent statute, apprentices, bound by indenture, are excepted out of the former provision for removal,*

**Construction of contracts.**

It has been already shewn, that residence under a contract for an apprenticeship will not confer a settlement, if the contract itself was originally defective. And the construction put by the Court of B. R. on these contracts is this, viz. that one party contracting to teach, and the other to learn, a trade, shall be construed an apprenticeship; and that nothing but the clearest intention in the parties to make the service contracted for one of a different descrip-

\* 11 East's R. 176.—7 East's R. 466.

† 13 and 14 Car. 2, c. 12.

‡ 3 W. c. 11.

tion, shall controul the construction, or take it out of the general rule.\*

However, it has been decided, that if there be a valid contract for a hiring and service, which is afterwards attempted to be converted into an apprenticeship, but the contract for such conversion turn out to have been deficient, it shall not cancel, or do away, the former valid contract; but if the term of service, originally contracted for, have been performed, a settlement shall be acquired under such contract for hiring.†

An indenture of apprenticeships may be assigned from master to master, through any number successively; and if the original contract were valid, and the assignments are regularly made by each master in succession, the residences under them for the purposes of settlement, will be governed by the same rules, as if the apprentice had continued in his first place of abode under the indenture. But though the assignment may be by parol, it must be express, and for a *particular* service, not a general leave or license to serve *any one*, at the discretion of the apprentice; for such permission, and service, will not amount to an assignment, and therefore cannot obtain a settlement.‡

\* 2 East's R. 298.—2 Bott. 230.

† 14 East's R. 541.

‡ 3 Term. R. 605.—1 East's R. 69, 73.

And an assignment by the executor of ~~the~~ master, will have the same effect, as by the master himself.\*

**Assignment by deed.** It has been observed, the assignment may be by deed, by parol; but if it be by deed, it must be governed by the same rules of evidence, when offered in proof, as the original indenture; that is to say, it must be stamped, and having been reduced to writing, must be produced, and cannot be proved by parol testimony.†

*The premature conclusion, &c.*

**Bankruptcy of master.** The master becoming a bankrupt does not

of itself operate as a dissolution of the apprenticeship, or discharge the indentures;‡ nor does an agreement to cancel them, on a sum of money to be paid by the apprentice at a future time, and an abandonment of the master by the apprentice, in consequence of such an agreement;§ nor even a voluntary entering into the King's service, the master not prohibiting it, but not giving up the indenture.||

**Regulations by stat. for discharging apprentices.** But apprentices, with whom less than 5*l.* has been given, may be discharged by two Justices from any master who is so far reduced in cir-

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\* Cald. Ca. 60.—1 Maule and Selwyn's R. 377.

† 6 Term. R. 452.

‡ 2 Bott. 395.

§ 8 Term. R. 108.

|| 2 Bott. 402.

circumstances as to be unable to keep or employ such apprentice.\*

Also an indenture may be put an end to of a *parish* apprentice by *all* parties, that is to say, the master, the apprentice, and the parish officers, consenting, but not otherwise. Also by the master and the apprentice only, *the latter being of full age*, but not otherwise; for though an apprentice under age may *bind* himself, being a contract necessarily for his advantage, and a case excepted, by the general rule of law respecting infants, the consent of an infant alone to his *discharge*, is "no consent at all."†

The master assigning, and the apprentice consenting, without the approbation of two Justices, will not make an apprenticeship within the statute of Elizabeth, according to Dalton.‡ We learn by a decision just cited, that the assent of the apprentice adds no authority to the assignment; and it appears from the general current of recent authorities, that these apprenticeships being compulsory, it is the assent of the overseers that gives the validity to all acts on the part of *infant parish* apprentices; but since by the statute 32 Geo. 3, masters by the consent of two Justices, may assign these apprentices, and their executors, &c. may assign within three months, upon similar con-

\* 32 Geo. 3, c. 37. † Burr. S. C. 462.—1 Black. R. 592.

‡ Dalton, c. 58.

ditions, which power is usually exercised, the premature conclusion of the contract by death, is rarely the source of any litigation.

All these cases indeed, would be of no importance to the particular subject matter of this section, except that the question "whether an indenture continues in force, or is cancelled," and therefore the inferential question,

*How these regulations apply to settlements.* "whether an apprentice serving in another place, than that to which he was originally bound, is to be considered as discharged from his indenture and *sui juris*; or whether he be serving under the indenture, and in the implied service of his original master," is often of essential importance for the determination of Appeals respecting the settlements of such apprentices in the actual employ of other, than their original masters.

After what has been premised under the consideration of evidence, and especially that portion which treats of copies of deeds, and of the application of parol testimony to prove the existence of written documents, it will be sufficient to observe here, that,

The Sessions may receive parol evidence of an apprenticeship, if the indentures be destroyed, or cannot be found, or produced. And if the opposite party produce an indenture, on notice given to them for that purpose, it may be read without any proof of the execution: this was formerly *verata questio*, but it has been of late fully established. In civil actions, where

a plaintiff wishes to give, in evidence, a deed in the defendant's custody, he gives the defendant notice to produce it; and the deed, when produced, must *prima facie* be taken to be duly executed, because the plaintiff, not knowing who are the subscribing witnesses, cannot come prepared at the trial to prove the execution. Therefore an instrument coming out of the hands of the opposite party, must be taken to be proved.\*

**HIRING AND SERVICE** is the next mode of superseding the settlement by birth or parentage, which presents itself for consideration; because it is that which, next to apprenticeship, generally occurs earliest in life to that rank of persons who are the objects of the law of settlements.†

Keeping in mind the statutes of Charles, before introduced, respecting a residence of 40 days without removal, which is, in truth, the *foundation* of all kinds of settlement arising out of residence, the subsequent statutes on the subject will be found to be only so many exceptions made, from time to time, to its provisions.

A cursory Reader would probably think the original statute itself, and those which were

\* 2 Term. R. 41.

† See *Prant. Expos.* i. *Title, Pron.* sub. 3.

made to restrict its operation, spoke so plainly the intentions of the Legislature, and formed so intelligible a system, that no doubts could arise upon their construction: however, the fact is, that no head of settlement has given occasion to so many difficulties, and to so great a variety of interpretations.

Statutes by  
way of ex-  
ception.

By 3 Will. and Mar. c. 11. "If any *un-*  
" *married person*, not having child or children,  
" shall be lawfully hired into any parish or  
" town for one year [and shall continue and  
" abide in the same service during the space  
" of one whole year, by 8 and 9 Will. 3, c. 30.]  
" such service shall be adjudged and deemed  
" a good settlement therein, though no notice,  
" in writing, be delivered and published, &c."

But by 9 and 10 Will. 3, c. 11. "no person,  
" who shall come into any parish by *certificate*,  
" shall be adjudged by any act whatsoever to  
" have procured a legal settlement in such pa-  
" rish, unless he shall *bona fide* take a lease  
" of a tenement of the value of ten pounds, or  
" shall execute some annual office in such pa-  
" rish," (and of course not by a hiring and  
service.)

And by 12 Ann. st. 1. c. 18. "If any per-  
" son shall be a hired servant with any person  
" who did come into, or shall reside in, any pa-  
" rish, township, or place, by means or licence  
" of a certificate, and not afterwards having  
" gained a legal settlement in such parish,

" township; or place; such servant shall not  
 " gain any settlement in such parish, township,  
 " or place, by reason of such hiring or serving  
 " therein; but shall have his settlement in such  
 " parish, township, or place, as if he had not  
 " been an hired servant to such person. s. 2."

" Also, by 33 Geo. 3, c. 54. No person who  
 " shall be a hired servant to any person who  
 " did come into, or shall reside, in any parish  
 " township, or place, under a certificate from  
 " a Benefit Society, and not afterwards having  
 " gained a legal settlement in such parish,  
 " township; or place; shall gain any settlement  
 " in such parish, township, or place, by reason  
 " of such hiring or serving therein; but all  
 " such servants shall have their settlements in  
 " such parish, township, or place, as if they  
 " had not been hired to such person as aforesaid."

The first deviation from the obvious interpretation of the former of these statutes, was of the words on the term "*unmarried persons.*" "And it has persons." been decided in many successive cases, that a *widower*, although he have children living, may gain a settlement by hiring and service, provided those children are emancipated, and have gained settlements in their own right.\*

And if a married man agree *conditionally* to become the servant of another, and before a

definitive agreement take place, the wife die without issue, he will gain a settlement by a hiring and service for a year.\*

And a marriage after the hiring, and during the service, will not prevent the servant from gaining a settlement; for marriage does not hinder the service, and the contract continues; therefore if the man performs his service, he gains a settlement.†

Once for all, let it be observed, that if the words of the statute be but complied with, respecting the contract, and the service under it, according to the interpretations put upon them by the Courts, the *relation*, in which the contracting parties *stand to each other*, is of no importance whatever.‡

**The hiring.** The next question which has been agitated, has been "what shall be construed a hiring?" When done by express words, it admits of no doubt; but *constructive* hirings were admitted, and then the latitude given to interpretation was almost unbounded.

**General hiring.** Thus it has been decided that any contract which purports to be a *general hiring*, without any limitation of time being mentioned, shall be interpreted a hiring *for a year*.

\* Burr. S. C. 455.

† 3 Term R. 382.

‡ 2 Term. R. 37.—2 Batt. 204.

And moreover, that where there be only actual service proved, yet where the nature of the service is such as necessarily implies a hiring, the Courts of Law will raise such implication.\*

The very words of the Court of B. R. in two modern cases will be sufficient on this part of the subject.

"The general rule is, that *an indefinite hiring, without any circumstance to shew that a less time was meant, shall be considered as a hiring for a year.*"†

"All that is necessary to give a settlement under the statutes is, that there should be a hiring for a year, and a service for a year. There must therefore either be an express, or an implied, contract for a year, in order to give the servant a settlement. And an express hiring for eleven months will not confer a settlement, unless the Sessions find that it was fraudulent, and that a year's service was intended, though only eleven months were expressed."‡

But if it appear that the servant was hired to work by the piece this shall not be considered as a general hiring for a year. §

\* Burr. S. C. 823.—3 Term R. 447.

† Cald. Ca. 420.

‡ 3 Term R. 276.

§ Burr. S. C. 513.

By the week. So, if it appear that the servant was hired as a *weekly labourer*, it shall not be considered as a general hiring for a year.\*

And where nothing is said, in a contract of hiring, about the *time*, but a reservation of *weekly wages*, it is a weekly hiring only.†

Hiring indefinite, wages reserved. But although the hiring be at so much *per week*, yet if the hiring was *intended* to be for a year, or if it appear from circumstances to

have been *general*, the reservation of weekly wages will not controul that hiring.‡

After the subject of general hirings had been pretty well disposed of, then *special* hirings, and *conditional* hirings, and *customary* hirings, became subjects of controversy. On these points a few determinations will be sufficient.

Special hiring. A *hiring for a year*, to be paid according to the work done, is a good hiring, and a service for the year under it completes all that the statute requires.§

So, a hiring for three years at so much *per week*, to work twelve hours, and to be paid for *extra hours*, is a good hiring.

So, hiring for eleven months, and to give the master a month's service in, beyond the eleven

\* 2 Term R. 453.

† 5 East's R. 582.

‡ 4 Term R. 245.

§ Burr. S. C. 152.

months, is a good hiring for a year. The real question is no more than, "Whether eleven months and one month make twelve months?" There are no particular technical words necessary to make a hiring for a year. The substance of this agreement is, to serve twelve months, and what signifies the variation of expression? Every contract to serve, is a contract to serve for a year, unless there be something to explain it otherwise;\* and if there be nothing. So, if the servant be hired for a year, with permission to be absent for a month to attend his duty in the militia, *upon finding another to do his master's business*: a service under this hiring will gain a settlement.†

So, if it be the custom of the country, to let the servant have every *Sunday* and *holyday* throughout the year to himself, the servant notwithstanding he uses this privilege, will, on a hiring for a year, and by serving that year, gain a settlement.‡

But if, upon the hiring, it be agreed that the service shall be only during certain hours in the six working-days, and that all the rest of the time, as well as on *Sundays*, the servant shall be at liberty and his own master, this is not a good hiring for a year.

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\* Burr. S. C. 433.

† Id. 753.

‡ Id. 671.

So, if it be agreed, on the hiring, that the servant shall be at liberty to serve elsewhere for the harvest month, this is not a good hiring for a year.\*

As, where a pensioner of the East-India Company hired himself as a servant for a year, with a reservation to himself of two days in each half-year, in order that he might go for his pension, he was held not to have gained any settlement by a service under such contract; for, by the Court, "here was an *express exception* of four days in the year, during which the pauper was not to be under the control of the master.†"

**Customeary hiring.** A hiring for a customeary year, as from *Whitsuntide* to *Whitsuntide*, such hiring being intended for a year, and so considered by the parties, is a good hiring for a year, although it fall short of 365 days.‡

So, if the pauper be hired at a fair held the day immediately after *Old Michaelmas*, to serve till the *Old Michaelmas-day* following; this will be a sufficient hiring for a year, for the days shall be taken inclusively.§

For, as it was observed by Lord Mansfield, in the case which is here selected in support of

\* Burr. S. C. 439.

† 1 East's R. 599.

‡ 1 Term R. 694.

§ Burr. S. C. 719.

the doctrine advanced, "there must be a hiring for a year. It has been determined, that a hiring from one moveable feast to another, is a sufficient hiring, being according to the custom of the country, although there should not be 365 days: on the other hand, a hiring two days after *Michaelmas* to the next *Michaelmas*, has been determined no good hiring; and therefore the question is, Whether here was a hiring for a year? Great criticism has been made on the word *till*; it may, or may not, be exclusive, according to the subject matter. Here the custom is very material to explain it; the custom is to hire from the next day after *Michaelmas*. If this be wrong, there can be no settlement gained in this part of the country by a servant."

But in another case, (in perfect conformity however with the last, if the discrimination be properly attended to) a different conclusion was drawn. The pauper went to the market-town of *Otley*, where there is a custom for servants to hire by the year, at two different Statutes, one held on the *Friday before Old Martinmas-day*, the other on the *Friday next after Old Martinmas-day*; at which latter Fair, they always hire till the *Old Martinmas-day* following; which by the custom is considered as a hiring for a year. *Old Martinmas-day* 1774, was on the *Tuesday*; and on the *Friday* following, being the *second Statute-Fair*, the pauper hired

hired himself to serve a person in *Harwood*, till the *Old Martinmas-day* following; which person he accordingly served in *Harwood* till the *Old Martinmas-day* following.—This being a hiring for three days less than a year, the Court were clearly of opinion, that this was not a sufficient hiring for a year; and Buller, J. observed, That “there is no case in which a hiring, which must *necessarily* be less than a year, has been adjudged to give a settlement,” and it would be dangerous to make a new precedent of that sort; all the cases agree that there must be a hiring for *a year*.”\*

In estimating the precise value of the word “*until*” it is necessary to observe further, that not only the circumstances of the particular case must be the guide of interpretation, but that, (as was said by the Court of B. R. on another case,) there is no fraction of a day, and therefore a settlement will be complete where the minutest part of a day being included will make up the year’s service, *or 365 days*.†

Retrospective hiring.

A retrospective hiring cannot be admitted in any case to make a settlement, for it would be nonsense to make a contract for a time past. And, on a point so obvious, a single authority will be sufficient, especially as it was one which has always been relied on, in cases of this description.

\* *Cald. Ca.* 160.

† *1 Term R.* 490.

A gentleman of the parish of *Ilam*, hearing that the pauper was a likely boy to serve him as his postillion, sent to have him upon *liking*. After the pauper had served eight weeks on *liking*, *his master hired him for a year, to commence from the beginning of the said eight weeks*. He accordingly served his master in the said parish of *Ilam*, including the said eight weeks, a year and ten days, and no longer.—The Court held this case to differ from all, former cases. The question was, whether here be a hiring for a year? It is agreed, that there must be a hiring for a year, and a service for a year, to gain a settlement, and that a retrospect will not do; which latter is the case here; for the lad came upon *liking*; and *at that time* there is nothing stated of a hiring, during which eight weeks both parties were at liberty.—They therefore held this to be no settlement.\*

But an hiring for a quarter of a year, and if <sup>Prospective</sup> the master and servant like one another, to <sup>conditional</sup> *continu<sup>e</sup>* for a year, is a good hiring for a year, <sup>hiring rendered complete by service.</sup> for the Court held the conditional hiring to be vice, a good hiring for a year; because the *master* and she did like one another, and a year's service was actually performed under it.†

But though the hiring be allowed to be con-

\* Burr. S. C. 304.—Cald. Ca. 23.

† Id. 280.

The contract ditional, and if the condition be performed to must be en- be good, yet it must be by an entire contract tire.

for a year, and not two contracts for two half years; for if it were so, one that was hired by the month only, if he continued in the same service for twelve in succession, might be supposed to gain a settlement.\*

But differ- ent services may be con- nected with the hiring.

But a service for a year, though it be under different hirings, is good, if one of the hirings be for a year, as where the pauper was hired to serve from *Lady-day* to *Christmas*, which he did, and was then hired by the same master for a year, and served under this second hiring until the end of *May*, making in all above a year.—This was adjudged sufficient to gain a settlement.

But there is such an infinite variety of cases of this kind, that the insertion of one recent one at length, must serve by way of exposition to the substance of the general doctrine. Its immediate purpose is, to shew that the service under an imperfect hiring, may be connected with the same service under a perfect hiring, although under such perfect hiring there may not have been a residence of forty days.—Thus in *Rex. v. the inhabitants of Adson, Hil. 33, Geo. 3.* The pauper was hired in *Church Stow* eight days after *Old Michaelmas* to the *Old Michaelmas* following; and continued in his

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\* 10 Mod. 392.—2 Bott. 264.

master's service till the day after *Old Michaelmas-day*, when he was hired by his master till the *Michaelmas* following, and under that hiring he only served ten days.—By Lord Kenyon, C. J., "Upon one point of this case there can be no doubt, that, to gain a settlement, the service for a year need not be under a hiring for a year. Whether that question was rightly decided originally, or not, it is now too long settled, and has been too often recognized, to be again disturbed. I have always considered it as equally settled, that if there was an hiring for a year, constructive service for a year, and a residence for forty days, that it was sufficient to confer a settlement; and I have never heard it advanced, previous to the present case, that the service for forty days must be subsequent to the hiring for a year. That this has been the general understanding upon this subject, it is fair to suppose, since no case has been adduced to support the contrary position." The case stood over for further argument; but afterwards Lord Kenyon declared, without any further argument, "that the Court were of opinion, that the pauper had gained a settlement in *Church Stow*; although there had not been a service of forty days subsequent to the last hiring."\*

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\* 5. Term R. 98.

**Discontinu-  
ance of ser-  
vice.** But where the hiring is imperfect, and there is a complete and absolute discontinuance of the service under it; such service cannot be coupled with a service under a new hiring for a year, for the purpose of gaining a settlement. This has produced many questions as to what shall be considered a complete and absolute dissolution of the service.

It was long held that two requisites were necessary for joining these services, so as to acquire a settlement, viz. that there was to be no discontinuance or chasm between them, and also that they were to be services *ejusdem generis*. The latter point, however, is now exploded, but they must still be united services; that is to say, one must not be entirely concluded and done away with, so as to produce an interruption between that and the commencement of the next. Two cases on this subject must suffice, by way of example, because they refer to both these points.

The pauper being settled at *S.* was hired the latter end of *November*, to one *Welch* of *W.* till *Michaelmas* then next, at *6l. 10s.* wages. Two or three days before *Michaelmas*, the master offered him the like sum for the year ensuing, which the pauper did not think sufficient. On *Michaelmas-day* the master offered him seven guineas, and they had agreed for wages, all but the expence of washing. The servant had no intention of

leaving his master; and he believed his master had no intention of parting with him. He continued in his master's house, and did what was to be done as usual, but without any obligation, lodged at his master's house, and did not remove any of his clothes, or offer himself to any other master, nor did his master seek after another servant. He thought himself at liberty to have left his master if any better hiring had offered. He did not agree with his master on this day; but *the day next but one*, being the *second day after Michaelmas*, the pauper agreed to accept the seven guineas before offered him for the year ensuing. He did not expect that his wages were to be due on the following *Michaelmas*, but at the expiration of the year from the day he agreed with his master to accept the seven guineas; and he continued in the service till the *Whitsuntide* following.—Ashurst, J. "I think this was a good service in *W<sub>3</sub>*. All that the statutes require is, that there shall be a hiring for a year, and a continuance in the same service for a year. If so, the only question is, whether there was any discontinuance? It appears from the case that there was not; for the servant continued in the same capacity; he did his work as usual; and if he had continued to serve for half a year without entering into any new contract, he would have been entitled to a compensation for such service; the

law would have implied, that he continued under the former agreement, and would have measured his damages by his former wages. Then he must be taken to have been in the capacity of a hired servant during that time."—Grose, J. "Two services cannot be joined if there be a chasm between them, or if they be not *eiusdem generis*; but in the present case, there was no chasm, and the services were *eiusdem generis*."<sup>\*</sup>

The pauper having a settlement in C. hired himself to a person of S. as a *weekly servant*. Nothing was said about Sunday, but he occasionally worked on that day. He received his wages weekly, and boarded himself, not being resident in his master's house. Thus he continued nine months, when a *family servant* going away, the pauper was hired in his place for a year, and served eleven months under that hiring. The questions, on a special case, were, whether these services, one before the hiring for a year, as a *weekly labourer*, and the other after as a *house servant* could be coupled, so as to make a years service, connected with the hiring for a year, under which hiring there were in fact only eleven months service.—Secondly, whether two services being of such *different kinds* could be coupled at all. Lord Kenyon said "it had been too long settled

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\* 1 Term. R. 778.

to be brought again into question, that if there be but a *hiring for a year* and a *service for a year*, however small a part of the latter be actually performed under the former, a settlement will be gained. As to the weekly service, if no exception of any one day were made, there was no pretence for saying that *day* was necessarily excluded, and in this case the servant occasionally doing work on a Sunday, shewed that he was considered under his controul on *that day*, as well as the others. It cannot even be collected from circumstances, that Sunday was *intended* to be excluded.

As to services being *ejusdem generis*, where Services in the line to be drawn? Would a postillion <sup>need not be</sup> *ejusdem generis*, being made coachman, be a service *ejus generis*?

*em generis*? There was a *continuing service* for a year, and there was during the time a *hiring for a year*, and therefore a settlement was gained.\*

In order to connect services in successive years, the servant must be unmarried at the commencement of the succeeding year; for if he be married he is incapable of making a new contract that shall give him a settlement, though marriage would not have defeated a contract made previously.†

So, if a servant being hired for a year, be rendered incapable of entering upon his service

\* 1 East's R. 656.—2 Bott. 272.

† Cald. Ca. 54.

at the time when it is to commence, by reason of sickness or otherwise, and the master therefore refuse to receive him, the serving under a *new* agreement for less than a year shall not be connected with the original hiring, for the purpose of giving a settlement.\*

Places of performing service may be different.

Another doubt which has been raised, was with respect to *the place* where the service was performed, it being assumed that the hiring was regular, and a year's service actually performed. But numberless decisions have been made to the effect that,

If a servant serve half a year in one parish, and then remove with his master, and serve the other half year in another parish, he gains a settlement where the last forty days are served.

Thus, where the pauper covenanted with one H. J. then of H. to serve him in husbandry, for a year ; and, in pursuance of the said contract, lived with him there for three quarters of a year, and then went with his said master into the parish of C, where he lived with, and served him, the rest of the year.—The Court were clearly of opinion, that the pauper had hereby gained a settlement in C.†

The 40 days need not be successive. And the 40 days need not be 40 days successively ; for if the residence of a servant be al-

\* Cald. Ca. 238.

† 2 Sess. Ca. 137.

ternately in two parishes; but he does not continue *successively* for forty days in either, but more than forty days *interruptedly* in both, he shall gain a settlement in that parish in which he last served. Thus, where a servant was hired for a year in the parish of *Fetcham*, and after 40 days serving married, and from that time slept with his wife every night for the remainder of the year in the parish of *Great Bockham*, except the last, when he slept at his master's in the parish of *Fetcham*.—It was held, that his settlement was in *Fetcham*.\*

But if a servant hired for a year marry in the middle of the year, and then agree to serve his master, *in a different capacity, for a year from that time, at different wages*, and to live *out of his master's family*, but at another farm belonging to his master in the same parish, this is a dissolution of the original contract, and the servant *being married* at the time of entering into the second, does not by his service gain a settlement; for, as was observed by one of the judges, “this is not a prolongation of the original contract, but *entirely a new one*, to commence at the time when such new one was made.”†

But if there be a hiring for a year, and the service be continued beyond the year, without

\* *Cald. Ca.* 290.

† *5 Term R.* 672.

any new agreement, the servant shall be settled in the parish where he resides with his master the last 40 days.

And if the master remove into another parish, and before the servant has resided there 40 days, his time of service expires, the service under a new hiring for another year, shall be considered as a continuation of the former service, and connected with it, so as to entitle the servant to a settlement in that parish to which his master removed, although he may not have served for a whole year under such second hiring.\*

Service by assignment.

If the servant having performed part of his service with the original master, be permitted by such master to serve out the remainder with another person, this shall be a good service to gain a settlement; for, as was said by the Court, "If a master lend his servant to a neighbour for a week, or any longer time, and he go accordingly, and do such work as his neighbour sets him about; yet all this while he is in the first master's service, and may reasonably be said to be doing his business; and here being no *new* contract, it is carrying on the service of the first master; and the second master paying the last half-year's wages, does not alter the case; for the contract not being

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\* Cald. Cas. 65.

dissolved, he might have brought an action against the first master."\*

So a service with the executor of a master with an exec to<sup>t</sup> for the remainder of a year, will be sufficient to gain a settlement.†

And an absence created by the default, or fraudulent contrivance, of the master, shall not prevent the servant's gaining a settlement.‡

So if a servant fall sick, absence on that account will not prevent the gaining of a settlement. Absence on account of sickness.

And a servant who is rendered incapable of performing his service, by being deprived of his reason forty days before the end of the year, and who is taken to his father's house, and resides there during the remainder of the year, does not, by this casual residence, gain a settlement in the parish where his father lives, but his settlement is in his master's parish.§

But if the absence be occasioned by the Wilful absence. fault of the servant, it will prevent the settlement. Thus, if a person hire a female servant, and before the year's end she is got with child, and that child is likely to be born a bastard; this is good cause to discharge her of her service; and if the master discharge her for this

\* 1 Str. 90.

† Barr. S. C. 170.

‡ 1 Str. 526.

§ 5 Term. R. 657.

cause; she may then be remoyed to the place of her last legal settlement, but not otherwise; for if the master is willing for her to continue in his service, she cannot be remov'd therefrom upon any complaint of the parish officers, the Justices having no authority to dissolve the contract between the master and servant, by which the latter is bound to serye the former, if he insist on it.\*

*Dissolution by servant.* But if a servant, before the expiration of the year, request leave of the master to go into another place, to which he is hired, and the master consent thereto, and pay him his whole year's wages, that is a dissolution of the contract, and prevents the gaining of a settlement.

*Last night's lodging designates the leave of his master.* And where the servant is absent with the place of settlement. he shall be settled in that parish where he sleeps the last night, provided he has served there forty days in the course of the year.†

But the whole residence must be within the compass of a year; for said the Court of B. R. in the most recent case on this subject, "It would be neither reasonable, nor expedient, that an enquiry should be gone into over a long period of time, at detached intervals, to ascertain a settlement."‡

The points, however, that have been made

\* Cald. Ca. 57.—495.—562.

† 5 Term. R. 387.

‡ 1 Maule and Selwyn, 222.

upon settlements, since the introduction of ~~ob-  
structive~~ hirings and services, have been so nu-  
merous, and diversified, that we must forbear  
to urge the subject further, and pass on to the  
next head of acquired settlement, which, in the  
common course, may be presumed generally to  
be,

MARRIAGE; of which a more restricted ex- Settlement  
amination is all that is necessary, <sup>by marriage</sup> inasmuch as, being a mode of settlement not liable to con-  
structive interpretations, general rules are suffi-  
cient for illustration.

1st. A woman marrying a man with a known settlement, shall follow it, and *that* even if she did not live there with him.

2dly. A wife can gain no new settlement for herself during coverture,

3dly. A woman marrying a man with no settlement, keeps her own.

First then, where the marriage is *legal*, the settlement of the husband shall, by the intermarriage, be immediately communicated to the wife; for wherever the husband is settled, there the wife must likewise be settled.

This being an admitted principle without exception, the only question it involves, that admits of being controverted on an Appeal, is the legality of the marriage under which the settlement is claimed.

By 26 Geo. 2, c. 33; all marriages solemnized after 25th March, 1754, in any other act.

places than a church or public chapel where bans have been usually published, unless by special licence from the Archbishop of Canterbury; or that shall be solemnized without publication of bans or licence of marriage from a person having authority to grant the same, first had; shall be null and void to all intents and purposes whatsoever." s. 8.

"Also all marriages where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, which shall be had without the consent of the father, or such of the parties, so under age (if then living) first obtained, or (if dead,) of the guardian of the party, and in case there shall be no such guardian, then of the mother (if living and unmarried;) or if there shall be no mother living and unmarried, then of a guardian appointed by the Court of Chancery; shall be absolutely null and void to all intents and purposes whatsoever.

"But this act shall not extend to the marriage, of any of the Royal family;—neither shall it extend to Scotland,—nor to any marriages amongst the people called Quakers; or amongst the persons professing the Jewish religion, where both the parties to any such marriage shall be of the people called Quakers, or persons professing the Jewish religion respectively—nor to any marriage solemnized beyond the seas." s. 17, 18.

**Marriages contrary to the provisions of this**

statute being declared void *to all intents and purposes whatsoever*, are of course void to the purpose of settlements, and neither can a woman herself, nor her children of such a marriage, obtain any settlement under, or by virtue of it.\*

And the words "*all persons*," in the provisions of the act, as to the consent of certain parents, guardians, &c. being necessary, are so comprehensive as to comprise illegitimate, as well as legitimate children.†

Although the statute does not extend to Scotch marriages. Scotland, it was long doubted whether English parties going to Scotland for the special purpose of avoiding the restrictions of English laws could be legally married. But in many recent cases such marriages have been decided to be good, and therefore must be held to confer a settlement.‡

And although the marriage be procured by fraud and conspiracy, it will be good for the purpose of acquiring a settlement;§ but the person so procuring it, will be liable to be indicted.||

Cohabitation as man and wife for a series of <sup>Proofs of</sup> years, is such presumptive proof of marriage, <sup>marriage.</sup>

\* Black. R. 192.

† 1 Term. R. 96.

‡ Ex parte Hall.—1 Rose's R. 30.

§ 1 Sess. C. 165.

|| Cal. Ca. 246.

as will give the children a *prima facie* title to the settlement of their parents.\*

And the proof of a marriage *in fact* is *prima facie* sufficient; and it is incumbent on the party who would impeach it, to shew wherein it is defective,

**Polygamy.** The frequent migrations of our soldiers for the last twenty years, and the numerous instances of marriages contracted by such persons, their former wives being alive, renders a few words on polygamy necessary, inasmuch as the settlements of the children of such marriages may become the frequent subjects of Appeal. On the offence of polygamy itself, or on the punishment of it as such, much observation would be misplaced here; our immediate concern being with its consequences as they affect settlements. It is enough therefore to say, that the statute which ordains the punishment,† describes it to be "any person *within* his Majesty's dominions of England and Wales, *marrying* any person the *former husband or wife being alive*." To the word *within*, this construction has been given, of certain words in the viz. that if the *first* marriage were beyond sea, and the *latter* in England, the latter is the offence, and the illegal marriage for which the party may be indicted here, and of course such

\* Burr. S. C. 508.

† 1 Jac. 1, c. 11.

marriage conveys no settlement; but if the second marriage be abroad, although no such second marriage can convey any settlement, it is no offence punishable here.\*

On the expression which denotes the offence itself, "*the marriage*," it is to be observed that, in the trying it as a crime, the first and true wife cannot be admitted a witness against the husband (nor *vice versa*) but the second wife, being in truth no wife at all, may be admitted.†

But on the removal of a woman to her supposed husband's settlement, the illegality of the marriage may be proved by either the man himself, or by his real wife; for, said the Court upon one occasion, "the woman was clearly an admissible witness, though she could not have been so in any case where her husband was a party; because the husband and wife are in law one person. But here the *husband himself*, if he had been alive, might have been a witness; and wherever the husband may be a witness the wife may."‡

But the fact of marriage cannot be inquired into after an order of removal, stating the parties to be husband and wife, if such an order be not appealed against; for the time being

\* Kel. R. 79.

† 1 Hale's Hist. 693,

‡ 2 Bott. Cons't. Edit. 81.

past for taking advantage in regular course, even though the fact were not then discovered, the parties who are damned must abide by the consequences, for they are estopped after.\*

On the last words of the paragraph, "*the former husband or wife being alive*," it is enough to observe, that three exceptions are made by subsequent clauses of the statute, which are, "where one of the Parties shall continue beyond the seas for seven years together; or, being within the kingdom for seven years together, shall be so secreted, that one party shall not know whether the other is alive; and thirdly to persons whose former marriage is void *ab initio*, or rendered so by sentence of a court of competent jurisdiction." These exceptions however, apply only to the trial of polygamy *as a crime*: Their consequences, as affecting settlements, present views of the subject somewhat different, but which have been already sufficiently considered in Chap. 2nd. respecting *non-access* in questions of bastardy, and under title, *Evidence*.

Women's  
settlement  
not suspend-  
ed during  
coverture.

The last point under this division, necessary to be noticed, is one which was long controverted, and agitated in many cases,† but which is at length settled, viz. whether the settlement of a woman marrying a man whose settlement is not known be suspended during *coverture*:

\* Burr. S. C. 551.

† Burr. S. C. 367.—Cald. Ca. 39, 371.—2 Bott. 86.

and revive after his decease, or whether it continue during coverture; and also as to the mode of proceeding upon an Appeal under these circumstances.

One case out of many was the following, which exhibits the best illustration of the point.

A widow and her four children were removed from the parish of *Woodsford* to the parish of *Winborne Minster*. The Sessions on Appeal adjudged the settlement to be at *Woodsford*, and quashed the order, stating, That by a rule of the *Dorsetshire Sessions*, upon all Appeals the appellants are to begin, and in the first place shew some settlement of the pauper out of the parish appealing. That in pursuance of the said rule, the appellants produced a copy of the register of the birth of *Mary Scutt in Asspuddle*; and the pauper *Mary Pitman*, swore that *Mary Scutt* was her maiden name. The counsel on the part of the respondents objected, that this was not sufficient; but that the birth of the pauper's husband, or some other settlement of his, ought to have been shewn; and farther, that to identify the said *Mary Scutt*, it was necessary for the appellants to prove the marriage of the said *Mary Scutt* with the said *Robert Pitman*. The Session adjudged, that the proof of the birth of *Mary Scutt* was sufficient; and that the *onus probandi* of the marriage lay upon the respond-

ents in order to prove their case ; and quashed the order of removal. It was moved to quash the order of Session, upon the ground that, the pauper having been removed in the character of a widow, it importeth, that it was a removal to the place of her late husband's settlement ; that, unappealed from, it would be conclusive evidence of his settlement ; and that as this must consequently have been the ~~only~~ point meant to have been brought in issue between the parties, the maiden settlement of the woman was nothing to the purpose, and did not apply to the question before the Court. But by THE COURT. "It may be, the husband had no settlement ; and if he had, *till discovered, her own would in the mean time remain. It is enough in the first instance.* The Sessions have done right. Motion denied."\*

In a later case it was decided, that an order of Justices for removing the wife and children of a pauper to the place of their settlement, is supported *prima facie*, by shewing that the place to which the removal was made, was the place of settlement of the wife before marriage, and although it also appeared by a copy of the marriage register, that the husband was therein described of *another parish*, (such description was held to be no *evidence* of his having a settlement there.)†

\* Cald. Ca. 236.

† 13 East's R. 311.

The next head of acquired settlement is Renting a <sup>tenement</sup> ~~tenement~~.

RENTING A TENEMENT.

By the statute of 9 and 10 W. 3, c. 30, before introduced as creating exceptions to the previous one of Car. 2d, one of those exceptions is, "the bona fide taking a lease of a tenement of the value of ten pounds." This communicates a settlement, even to the avoiding a certificate.

Four questions may occur upon the words of this statute, in deciding Appeals.

1. What shall be construed a "tenement?" Construction of the statute
2. What shall be a "bona fide taking?"
3. What shall be considered "a lease?"
4. What shall be the interpretation of the words "of the value?"

It has been determined by numerous cases, <sup>Tenement.</sup> too numerous indeed to be cited here, that <sup>Tenement.</sup> is a term of such comprehensive meaning, that it may extend to hereditaments incorporeal, as well as corporeal, and <sup>generally</sup> therefore, that any thing permanently attached to, or necessarily and immediately arising <sup>out</sup> of, land, may be considered as a <sup>Tenement.</sup> Thus the term, as applied by the constructions which have been put upon the act, covers *rabbit warrens*, even though the tenant have <sup>Warrens.</sup> no direct interest in the soil, because, as was said in one case, "it was a pernancy of the profits of the land by the mouths of the rabbits."†

\* See Pract. Expos. *Title*, Poor, sub. 5. † 3 Term R. 772.

Dairy of cows.

Fishery.

A right of common.

A mill.

After-marth

Machinery.

A bona fide taking.

*A dairy of cows* upon the same principle.\*

*A fishery*, for trespass will lie for it, and it may be recovered in ejectment, therefore it must be a tenement.†

*A right of common in gross*, because it is a matter of tenure, and a *præcipe* will be for it.‡

*A mill*, whether grinding by wind, or water. It is attached to the land.§

*After-marth or edish*, for it arises immediately out of the land.||

*Machinery*. And the distinction between what is, and is not, a tenement, is clearly shewn by a case in which the use of machinery in a mill was decided to be not a tenement to convey a settlement, and was likened, somewhat ludicrously, to the *liberty of pounding in a mortar*. It is a mere chattel removable at pleasure, and cannot have its peculiar value reckoned with the land on which it is placed.¶

*A bona fide taking* is a description that admits but of little controversy, and therefore of scarcely any illustration. Fraud vitiates *all* transactions, and therefore any fraudulent con-

\* 14 East's R. 284.

† 2 Bott. 97.

‡ 7 Term. R. 671.

§ 2 Bott. 93.

|| 4 Term. R. 348.

¶ 8 East's R. 449.

tract, to give the semblance of a fair transaction, and *thereby* to confer a settlement, is so obviously *not a bona fide* taking, that comment and authority are equally unnecessary:

But a contract may be legally considered as a *bona fide* transaction which satisfies the *words* of a statute, though not in strict compliance with the spirit which dictated it,

As where the pauper hired a house and land at *D*, at the yearly rent of *nine pounds* : which he occupied and paid rent for several years, from *Lady-day* to *Lady-day*. In the beginning of *September*, he married a widow of the parish of *W*, who resided in a cottage purchased by her former husband, and which might be of the value of *one pound ten shillings per annum* ; and about a fortnight after his marriage, he went and resided with his wife in the said cottage in *W*, aforesaid ; and kept the key of the house in *D*, till *Lady-day* following. His wife had never administered to her first husband, nor been admitted tenant to the said premises, nor ever paid any rent for the same. The Justices were of opinion, that the pauper could gain no benefit by the wrongful possession of the cottage ; he appearing to be only a casual occupant therein : and therefore adjudged it no settlement.

But the Court of *B. R.* were of a contrary opinion : they considered the words of the statute as complied with, and a rule having been

obtained to shew cause why the order should not be quashed, the same was afterwards made absolute, without defence.\*

A lease

*A lease* has been understood, under this statute, to mean nothing more than a contract; and even *that* the law will *imply*, under some circumstances, as was laid down by Ashurst J: in one case, in the following words:

“In order to acquire a settlement by taking a tenement of 10*l.* a-year, it is not absolutely necessary that there should be an express contract for the tenement; it is sufficient if the tenant reside forty days on a tenement of such value *with the permission and consent of the landlord*: for in such case the law *implies a contract*.”†

So also the occupation of a cottage for forty days, by the leave of an outgoing tenant, under an agreement with him to pay the landlord the same rent, which he, the outgoing tenant, had before done, but *without any authority from the landlord*, the cottage together with other premises occupied at the same time being 10*l.* a year and upwards, hath been holden sufficient to give the occupier a settlement; nothing appearing to shew that the former tenant's term had expired, and the law giving him authority to assign his interest.‡

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\* Burr. S. C. 744.

† 4 Term. R. 258.

‡ 1 East's R. 597.

*Of the value of 10l.* It has been repeatedly determined, that the *value* and not the *rent* is the true criterion, according to the words of the statute, and therefore if the rent be only 5l. yet the *value* may be 10l. or 20l. or other greater sum, and will consequently confer a settlement. Yet in ordinary cases, it has been almost as frequently observed by the Court of B. R. that the rent is a good medium *through which* to ascertain the *value*.

Therefore, where the pauper hired a house at Brighton by the week, paying four shillings a week for the same, which he continued to sleep in with his wife and family for three months, and which house was at all times of the year of the value of four shillings a week if taken by the week, but was found not to be of the value of 10l. *per annum* if taken by the year—The Court held that the pauper, by reason of renting such house under these circumstances, did not gain a settlement by virtue of stat. 13 and 14 Car. 2nd, c. 12, for though under this statute it is not necessary that the tenement should be let by the year, but it may be let by the week or day, yet those lettings are *media* for ascertaining the yearly value, and in this case it was expressly found that the tenement was not of the value of 10l. to be taken by the year.\*

But if there be no circumstances in the taking, which import the value to be less than the rent, the rent shall be evidence of the value.\*

Several occupiers jointly.

If a tenement be occupied by several persons as partners, and each of them have an interest in it to the value of 10*l.* a-year, although it be rented in the name of one of them only, they will all gain a settlement by residing thereon forty days.†

Part under-let.

But the party need not occupy the whole tenement himself, but he may under-let the same, or any part thereof, to another, if he think proper, and this will not prevent his gaining a settlement.‡

Forcibly prevented.

If a person residing on a tenement of 10*l.* a-year be *forcibly prevented* from residing thereon for 40 days, the Court will not decide that he gained a settlement in the parish, unless the order of Sessions state, in express terms, that it was done with the fraudulent intent of preventing his gaining such settlement; for the Court cannot infer fraud, it must be expressly stated.§

Thus, where a pauper took a tenement of 10*l.* *per annum* in a parish, and after living in it with his family for five days, was arrested and sent to prison in another parish, his wife and

\* 2 Str. 1156.

† 6 Term R. 554.

‡ Burr. S. C. 571.

§ 7 Term. R. 105.

children continuing to live in the first mentioned parish for seven weeks longer, it was held that no settlement was gained in the first parish either by the husband or wife.\*

But in order to gain a settlement by forty days residence on a tenement of the yearly value of 10*l.* the party must stand in the relation of a tenant to the premises for the whole time under one title; for, as was observed by Lord Kenyon, C. J. in one case, "If a mere residence for forty days irremovable were sufficient to give a settlement, every lodger and every servant residing for that length of time would then acquire a settlement;—but in order to gain a settlement by residing on a tenement of the yearly value of 10*l.* the party must stand in the relation of tenant to the property for forty days."†

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The next exception in the statute of 9 and 10 Will. so often referred to, is, "or unless he shall execute some annual office, in such parish, being legally placed therein;" which it is declared by this statute shall even avoid a certificate; and by a previous statute of the same reign‡ had been declared to give a settlement,

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\* 7 Term R. 466.

† 5 Term. R. 684.

‡ 3 Wm. c. 11.

if executed for *one whole year*, and on the party's own account..

First, It must be an annual office.

Secondly, It must be *in the Parish* wherein the party has come to reside.

Thirdly, He must have been legally placed in such office.

The offices within the statute.

The offices which have received the construction of *annual* offices within the statute, by different determinations of the Court of B. R. are as follow :\*

Constable, serving by himself or deputy ; Parish Clerk ; Sexton ; Tithing man ; Borough Warden ; superintending Constable of a City consisting of several parishes ; Hog-ringer to a Parish, receiving his appointment from them, and not from individuals ; Ale-taster of a borough, being an annual appointment ; Collector of the Land-tax ; all which are of the description of *offices* designated by the statute, in their nature *public* offices, recognized by, and for the benefit of, the *whole* parish, and the holders *annually* appointed to serve *for a year*.†

Offices not within the statute.

On the other hand certain offices have been determined *not* to be within the statute ; for example those of Curate, which though an office sufficiently public, was not *one* in contemplation of the statute, which only looks to *inferior* offices ; Governor of a work-house, because he

\* See Pract. Expos. *Title, Poor*, sub. 7.

† 7 East's R. 167.

is to be considered rather as a *servant* than an *officer*; “*office*,” meaning office derived from the term, Crown, or created by statute :\* *Deputy Constable*, for he is merely the servant of another, which other acquires a settlement by the service of the Deputy ; Schoolmaster who was merely the servant of the Vicar, and not, in any of the senses of the expression, a *Public officer* ; lastly, all officers whose appointment is for less than a year, or upon an uncertainty of duration for that time.†

The construction put upon the statute, as it respects the *other two* points, will be easily collected from the two following cases, which set the subject in a clearer light, than any positions by way of inference from them, could do.

A certificate-man from St. Thomas's came <sup>Construction</sup> into the parish of St. Mary Calendar in Win-<sub>in the parish</sub> chester. He was afterwards chosen one of the constables for the city of Winchester, which city consists of several other parishes besides that of St. Mary Calendar ; and was legally placed in that office, and executed it, in and through all parts of the city, for one whole year, during which time he resided in the parish of St. Mary Calendar. — By the Court unanimously. He avoided his certificate, and consequently gained a settlement in St. Mary Calendar, by executing this office in that pa-

\* 7 East's R. 167.

† 8 Term R. 445.

rich ; though chosen by the whole city, and not by the parish of St. Mary, singly ; and though not a mere parish office : for, in the words of the act, "*he executed an annual office in the parish*," being legally placed therein.\*

Construction of legal  
by placed.

But in the *K. v. Winterbourne, Hil. 4 Geo. 3.*, the custom was for the *constable to be presented by the leet-jury* ; the jury presented Richard Bayley, Esq. who procured the pauper to serve for him, in order to gain the pauper a settlement ; the pauper was accordingly sworn into the office, before a Justice of Peace, and served the same for the whole year ; "but he was not presented thereto at any Court-leet, as a constable in his own right," according to the custom.—By the Court. The case expressly states, "that he never was presented to the office at any Court-leet, as constable in his own right ; and that the custom requires all constables to serve for the said tything to be so presented." Therefore he gained no settlement because he was *not legally placed therein.*†

Settlement  
by estate.

THE possession of an estate is the next medium, through which a settlement can be acquired ; which it is proposed to discuss. However necessary to a perfect understanding of the law of settlement it might be to consider this division of the subject much at length, it can-

\* *Burr. S. C. 27.*      † *Id. 520.*

not be so here; since the sum paid, where the estate is obtained by purchase; and the title by which it is occupied, when devolving upon the party by operation of Law, from a previous purchaser; are the only questions to occasion controversy by an Appeal to the Sessions, respecting persons of either description.

It is enacted by statute, that " no person shall be deemed to acquire any settlement in any parish or place by virtue of any purchase of any estate or interest in such parish or place, whereof the consideration for such purchase doth not amount to the sum of 30*l.* *bona fide* paid, for any longer time than such person shall inhabit in such estate; and shall then be liable to be removed to such parish or place where such person was last legally settled before the said purchase and inhabitancy therein."\*

Before we proceed to an explanation of Paupers not these words, it is necessary to premise that <sup>removeable</sup> from their *a person may not be removed from his own* <sup>own</sup> *estate*, even though it be not of such a description, or so obtained, as of itself originally to confer a settlement; and that by residence thereon for 40 days, under such certain circumstances as do not absolutely prohibit his acquiring one, he may obtain a settlement. Two cases, even under unfavourable cir-

stances for the support of this general position, are sufficient to establish it. The pauper's husband was settled at White Rooding, from which place he went away, and deserted his wife and children. The wife left White Rooding, and went, with her children, and "lived forty days without her husband, in a copy-hold tenement of her husband's own, at Aythorp Rooding." She was removed from thence to the parish of White Rooding. The Court were unanimously of opinion, that "although the wife *could not gain a settlement* for her husband by residing forty days upon his own estate, yet that she was *irremovable from the property* of her husband; for she had a natural, or at least a matrimonial right to go to her husband's estate; and as there did not appear to be any dissent of her husband, it was rather to be presumed, that he consented,"\*

A pauper resided several years on a leasehold estate granted to him for three lives, in consideration of two guineas fine, and one shilling rent. He became actually chargeable, and the question was, whether, under this extreme circumstance, he could be removed to the place of his settlement. The Court of B.R. said "it was one thing to say, that a person may not be removed, but another to say, that they gain a settlement. That the pauper could not

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\* Burr. S. C. 412.

be removed from his own, but that being a purchaser under 30*l.* and the estate not coming upon him by operation of law, he gained no settlement by forty days residence on it.\*

What shall be understood to be possession by "operation of law," sufficient to enable a person to acquire a settlement by forty days residence, on their own estate, may be collected from the following. One case was, that, thirty years since, the father of a pauper built a cottage upon the waste in a place called Wyley, belonging to the Earl of Pembroke, and lived on it till his death, about three years since, when it descended to his daughter Elizabeth, then married to John Darby; that they entered and enjoyed it three quarters of a year, and then sold the possession of it to John Wyvel, who has enjoyed it ever since, without any molestation from the lord, but no original grant appears: and whether John Darby and his family are settled in Wyley, where they lived three quarters of a year in the cottage in right of his wife, or in Ashbrittle which was the place of his last settlement before the marriage? was the question; and by the order of two Justices, and the order of Sessions, it is adjudged to be a settlement in Wyley.—By the Court. "The order must be confirmed; he lived forty days in the capacity of a person

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\* 6 East's R. 40.

irremovable, and that is a settlement of itself. Here has been an enjoyment for thirty years, during all which time the lord never claimed any thing. The least that can be made of it, is a title by disseisin, and a descent is cast. This man had undoubtedly a title against all the world but the lord, and even against him it may be doubtful, after so long a possession. In ejectment, he might either make, or defend, a title by twenty years possession. Therefore in this case there is no colour to determine against his right, when the lord does not think fit to impeach it; though if he did, it would never be allowed to determine the title upon an order of removal; but upon an ejectment only."\*

In conformity with this determination, have been a great number of others up to the present time, all founded on the same reasoning, and involving nearly the same questions.

By marriage A person residing on an estate by virtue of marriage, will thereby gain a settlement; so though the premises be vested in trustees for the separate use of the wife, the husband, by residing on the estate for 40 days, will be legally settled; for it would be refining too far to say, that an equitable estate will not confer a settlement as well as a legal one.†

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\* 2 Str. 608.

† 3 Term R. 114.

On similar principles it has been decided, Right of Dower. that the widow of a man, who dies seized of a house, residing in it 40 days in right of her dower; and children residing for the same period, on an estate devised to trustees to be sold for their benefit, before such sale; will gain a settlement.\*

And where a person bequeathed by will an estate, originally purchased for less than 30*l.* to trustees to let for his daughter's life and pay her the rent, and after her decease, to his right heirs; the trustees suffered the pauper to reside on the premises more than 40 days after the decease of her father, and the Court of B. R. determined, that by so doing she gained a settlement, for she did not reside as a tenant, and whether her title were a legal, or only an equitable one, was the same thing as to gaining a settlement by residence on it.†

But no person, who is entitled as an executor or administrator, can gain any settlement by a residence on the estate, before he has obtained a probate or letters of administration.‡

Except such executor or administrator be *sole next of kin*; and then it has been helden that such a case forms an exception.§

And after twenty years quiet possession, the 20 years quiet pos-  
session.

\* Cald. Ca. 474.—Burr. S. C. 793.

† 16 East's R. 127.

‡ Burr. S. C. 109.

§ 8 East's R. 405.

party shall be deemed to have gained a settlement, though no administration was ever in fact taken out.\*

**Gift without regular conveyance.** Upon the same principle, if a person resides on an estate *given* to him by a relative, for a long series of years, without interruption, he will thereby gain a settlement, though no formal conveyance may have actually been executed; but this is only on the ground of long possession throwing some sort of security over the original transaction, and therefore affording a ground for presuming a legal commencement.†

For in another case, where a voluntary conveyance of a trifling estate had been of short standing, from a father to his son, the son was held not to have gained a settlement on it by forty days residence, "because," said the Court of B. R. "every estate not acquired by *descent*, is in law a *purchase*, and the party cannot hope to be in a better condition, because he pays no money for the land."‡

**Accession without residence.** Accession to an estate without a residence of forty days will not gain a settlement.§

But the forty days residence need not of necessity be successively.||

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\* Burr. S. C. 444.

† 6 Term R. 554.

‡ Burr. S. C. 56.—386.—560.—Cald. C. 416.

§ 1 Str. 476.

|| Burr. S. C. 125.



If an estate *descend* to a pauper, and he reside in the same parish forty days afterward, although he may immediately after the descent to him, have contracted to sell the estate to another, yet if the conveyance be not executed till after the forty days of residence be expired, he will gain a settlement.\*

Having now gone through a sufficient number of cases for an ample illustration of the general doctrine of persons being irremovable from their own estates, as well as to shew how far residence, coupled with possession by operation of law, goes in conferring settlement, it is time to advert to the principal subject of consideration in the statute we are examining, viz. what is the interpretation by authority of the words "*whereof the consideration for such purchase doth not amount to the sum of 30l. bona fide paid.*"

The plain and obvious meaning of which words is, that, if an estate be granted for a pecuniary consideration, and such consideration do not amount to 30*l.*, a residence thereon for forty days will not gain a settlement.

But it has been repeatedly decided, that *Pauper* though the party cannot pay the purchase <sup>mortgaging</sup> <sub>the estate.</sub> money out of his own funds, yet if he can borrow it on credit, *that* is sufficient to satisfy the words of the statute; and therefore although he mortgage the estate itself to raise the funds,

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\* 1 East's R. 206.

so that the estate be but purchased for 30*l.* paid bona fide to the vendor, it will be sufficient.\*

But the purchase of an estate subject to a mortgage is not sufficient for the purpose of gaining a settlement, unless the money actually paid for the equity of redemption amounts to 30*l.*†

Subsequent improvements not to be reckoned. And if the original purchase be under 30*l.* no subsequent improvements will be sufficient for the purpose of gaining a settlement.‡

A pauper purchased a messuage for 52*l.* under an agreement that the vendors should allow 40*l.* of the purchase money to remain upon mortgage of the premises. The mortgage was made and only 12*l.* paid by the pauper to the vendor, who kept the title deeds, but the pauper took possession and resided some years on the premises. He afterwards sold them to a third person for 60*l.* who paid 40*l.* to the original vendor, and the remaining 20*l.* to the pauper, obtained the title deeds from the original vendor, and the execution of the pauper to the conveyance ; after which period the pauper did not reside any longer on the premises, but delivered them up to the new purchaser. The Court said " the 40*l.* paid by the

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\* Burr. S. C. 57.—6 Term R. 755.

† 2 Term R. 12.

‡ Burr. S. C. 553.

new purchaser was for his own benefit, not for that of the pauper, who had in fact never paid more than 12*l.*; never had any possession of the title deeds, and therefore had not made a purchase of any value beyond the sum which was actually paid independent of the mortgage. That in all the other cases of mortgagors which had been decided in their favor, if they had not actually paid the whole money from their own resources, they had had at least credit to borrow it *aliunde*.\*

But a single woman purchases a tenement, and afterwards marries, the husband gains a settlement by a residence on this estate, and communicates the same to his wife, although the original purchase money was under thirty pounds, for the husband gained a settlement by forty days residence upon his own estate;— and his settlement communicates itself to the wife.†

And to gain a settlement, the residence need not be on the estate, for a residence, in any part of the parish in which it is situated, is sufficient. For according to Holt, C. J. “having land in a parish will not make a settlement, but *living in a parish where one has land* will gain a settlement:” for the act of Parliament never

\* 1 Maule and Selwyn R. 387.

† Burr. S. C. 566.

meant to banish men from the enjoyment of their own lands.†

**Certificates.** CERTIFICATES are fallen much into disuse since a recent statute declared that, “ *henceforth no poor persons should be removed from their places of residence till they should become actually chargeable ;* ”‡ but as the power to grant Certificates, with, their effects and consequences, still remain as they stood under the former statutes,§ by which they were introduced into the system of laws for the regulation of the poor, it is necessary to offer a few observations on such questions as are commonly brought before the Sessions by Appeal.

Substance  
of the Certi-  
ficate acts.

The substance of the statutes just now referred to is that, “ any poor person may go to inhabit in any other place than that in which he is settled, on *delivering* to the church-wardens and overseers of the poor of the parish where *he goes to inhabit*, a certificate under the hands and seals of the church-wardens and overseers, or *the major part* of them, or of the overseers where there are no church-wardens, attested by two credible witnesses, and allowed by two

† 2 Salk. 524.

‡ 35 Geo. 3, c. 101.

§ 8 & 9 Will. c. 30.—9 & 10 Will. c. 11.—12 Ann, c. 18.—3 Geo. 2, c. 29.

Justices having jurisdiction," acknowledging the person or persons therein named to be legally settled in the parish granting such certificate. But at least *one* of the witnesses, who attest the certificate, must make oath before the Justices allowing it, that he saw the churchwardens and overseers, whose names are subscribed as allowing it, actually sign and seal the same; and that the names of the witnesses are of their hand writing, and the Justices shall certify that such oath was made before them, and such certificate so allowed shall be evidence in all Courts whatever.

And such certificate shall only be discharged by one of the modes already treated of.

And no person so certificated, while the certificate shall continue operative, shall be able to communicate a settlement to any apprentice or servant."

On the specific expressions in the statute, it is sufficient to notice that *delivery to the churchwardens, &c.* cannot be an *actual delivery at the time* the pauper goes to inhabit, for otherwise it would be opening a door to innumerable frauds;\* and that the person wishing to take advantage of the certificate, must in fact reside under its authority, to satisfy the words, "come

Explanation  
of their lan-  
guage.

\* 5 Term R. 154.—2 Batt. 439.

*into any parish*," which are those of the statutes of 9 and 10 Will. and evidently mean, what is expressed in the other statutes on the same subject, by the words "*come into, or reside in*," and *come to inhabit or reside* ; and lastly, that "*the major part of the church-wardens*," &c. which was formerly a subject of frequent controversy, is now ascertained, by a recent statute,\* to comprehend the case of "*two persons only, acting or purporting to act, in the capacity of church-wardens, as well as overseers of the poor*," the same as if distinct persons as church-wardens, and other distinct persons as overseers of the poor, had been parties to any certificate. And by another, of the last Session of Parliament,† it is further provided, on this very subject, "*that all indentures for the binding of poor apprentices, and all certificates of the settlements of poor persons, which have been heretofore signed and executed, or which shall hereafter be signed and executed, by a person or persons, who at the time of his or their signing and executing such indenture, or certificate of settlement, acted as church-warden or church-wardens, chapel-warden or chapel-wardens, of the township, hamlet, or chapelry, binding such poor apprentice, or granting such certificate of settlement, shall be deemed and*

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\* 51 Geo. 3, c. 90.

† 54 Geo. 3, c. 107.

to be as good, valid, and effectual, as if the same had been signed and executed by a person or persons actually sworn into the office of church-warden, or chapel-warden of such township, hamlet, or chapelry; provided always, that such person or persons shall have been duly sworn into the office of church-warden of the parish wherein the township, hamlet, or chapelry, binding such poor apprentice, or granting such certificate, be contained, or into the office of church-warden or chapel-warden of such township, hamlet, or chapelry; and that all indentures for the binding of poor apprentices, and all certificates of the settlements of poor persons, which shall have been heretofore signed and executed, or which may hereafter be signed and executed by the overseers of the poor of any township, hamlet, chapelry, or place, and the church-warden or church-wardens, chapel-warden, or chapel-wardens, acting for, or appointed in respect of, such township, hamlet, chapelry, or place, or the major part of them, shall be deemed and taken to be as good, valid and effectual, as if the said indentures and certificates had been signed and executed by such overseers and church-wardens of the parish wherein such township, hamlet, chapelry, or place is situate, or the major part of them. Provided always, that nothing herein con-

tained shall be construed to alter, impeach, or affect the settlement of any person, for whose removal any order of Justices shall have been duly made before the passing of this act."

Assuming, then, that the certificate is regular in point of form, and that all the steps necessary to carry it into effect have been complied with, it remains to be seen what are its consequences in ordinary cases, and how it is

*Discharge of discharged.* With respect to a certificated certificate. person becoming possessed of an estate by operation of law, the general comprehensive rule is, "any person who has an estate of freehold, copyhold, or for years, by act of law, (as descent, marriage, executorship, or administration, may dwell upon it as his own; and is not removable; and gains a settlement if he continue forty days, though under 10*l. per annum*; but he must abide forty days in order to gain such settlement."\*

And where a cottage was devised by will to a certificated person, "*to live in during his life,*" it was held, with residence, to discharge the certificate.†

And a purchase, which of itself is sufficient to gain a settlement, is of course sufficient to discharge a certificate;‡ but a certificate may also be abandoned, though the party do not

\* Burr. S. C. 307.

† Id. 85.

‡ Id. 205.

any of the acts which factually go to discharge it; as where a certificated person leave the Abandon-parish to which he is certificated for some permanent engagement, which manifests his not having an intention of returning, for then the certificate is considered as *functus officio*.\*

And such cases are generally very distinguishable from those where the *manner* of a person's departure conveys an intimation that it is only for a *temporarily purpose*, as where his business is of a mere occasional nature, or where he leaves his family behind him as in his *domicile*.†

If a certificate be not either discharged, or abandoned by any of the modes above pointed out, Extends to poor universally.

Its general operations are "that it extends to poor of all denominations; to legitimate children born of certificated persons after the granting thereof; to a second wife taken after, and to her children born after, the granting thereof.‡ It does not, however, extend to a bastard Children born after granting. being pregnant with it at the time of granting the certificate, and such certificate referring specially to such child, in *ventre sa mere*.§ Nor to grand-children, unless specifically under the protection of, and part of the family of, the grand-father, or themselves individually nam.

\* 1 Term R. 354.

† 5 Term R. 526.—8 Term R. 339.

‡ Burr. S. C. 182.—314.—2 Burr. 680.—Id. 693.

§ Burr. S. C. 650.—7 Term R. 362.

ed; nor to children grown to maturity and emancipated.\*

Persons not married.

A certificate given to two persons as man and wife, though they afterwards turn out not to have been legally married, is good, if there were no fraud intended, and the parties ignorant of the irregularity; facts to be ascertained from circumstances, and found by the Justices.†

To whom it is conclusive.

A certificate is conclusive between the parish certifying, and the parish to which the certificate is granted; but as between the certifying parish, and any third parish, all matters remain open to investigation and controversy; the certificate only operates to the security of the particular parish to which it is certified; and the certificate person is not excluded by it from acquiring a settlement in another parish, in the same manner that any other person might do.‡

Relieving how far evidence of settlement.

BEFORE the subject of Appeals respecting settlements be entirely closed, it is necessary to say a few words on a species of evidence which has not unfrequently been exhibited, for the purpose of collecting an acknowledgement of settlement *by inference*; viz. the fact of a pauper or his family having been relieved by the officers of a particular parish *while resident in it*, in order to found upon that fact, the inference, that such relieving was an acknowledg-

\* 4 Term R. 227.—5 Term R. 583.

† 2 Bott. 578.—601.      ‡ 2 Bott. 579.—581.

ment of settlement. The utmost, however, that can be made of such an occurrence is, by way of confirmation of other evidence ; for of itself singly, it is none.

Relief, indeed, given by the officers of one parish, to a pauper resident in *another* parish, makes a case of a different complexion, for in such an instance, it cannot have been as casual poor, that they relieved him ; and, therefore, especially where the relief has been frequently or systematically given, it amounts to that *sort* of admission, which must be rebutted by strong evidence of an opposite tendency, to overturn the obvious presumption. In one case, evidence of birth was offered to rebut it, but the Court observed, that birth was of all evidence of settlement, the weakest.

There have been several cases determined on the question ; and though some have gone much further than others in establishing this doctrine, the last is so decisive, that a recital of Lord Ellenborough's judgment shall conclude the subject. It was in a case of *Rex v. Chatham*, (Inh. of), and his Lordship said— “ It is important on subjects of this kind that there should be one uniform rule, as far as is consistent with law ; and the rule having been once laid down, that the bare fact of giving

relief to a pauper within the parish, was no evidence of his settlement there, because it might be given to him as casual poor, it is proper to abide by it. If relief were given in this manner for any length of time, it might give occasion to different inferences, either that the party receiving was a settled inhabitant, or merely that his settlement could not be known. That would bring it to an alternative case on which the Session might draw their own conclusion and the difficulty would still exist. Upon the whole therefore it is the better rule to adopt, to say, that it does not amount to evidence of the settlement. There would be great impolicy in allowing it to have weight, for if parish officers by giving relief were to make evidence against themselves as to the settlement of the pauper, they would perform their duty to casual poor with great reluctance.”\*

**Removals.** It would be foreign to our purpose here to discuss the subject of the removals of the poor *at large*, because that is chiefly the duty of Magistrates as individuals, and not in their capacity of Justices in Session: referring the reader, therefore, to other authorities on that part of the law,† we pass to the *consequences* of removals, as they may be made a subject

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\* 8 East's R.

† Pract. Expos. *Title, Poor, REMOVAL OF.*

for the deliberation and judgment of the Sessions.

And first, it may be advanced generally, that, "an order of removal unappealed against, within the restrictions prescribed by statute, is conclusive; and that the settlement of the party designated in that order, is, at that time, in the parish receiving under the order, and not appealing against the same."

By 13 and 14 Car. 2, c. 12, "all persons <sup>Statutes giving appeal</sup> who think themselves aggrieved by any judgment of the two Justices, may appeal to the <sup>to the Sessions, &c.</sup> Justices of the Peace of the said county at their Quarter Sessions, who are to do them justice, according to the merits of their cause."

And by 3 and 4 Will. and Mar. c. 11, which orders the church-wardens and overseers to receive paupers removed by orders of two Justices, it is provided, "that all persons who think themselves aggrieved with any judgment of the said two Justices, may appeal to the next General Quarter-Sessions of the peace."

And by 8 and 9 Will. 3, c. 30, "the Appeal against any order of removal shall be prosecuted at the General or Quarter Sessions for the county, division, or riding, where in the parish, township, or place, from whence such poor person shall be removed, doth lie, and not elsewhere."

And by 9 Geo. 1, c. 7, "no appeal from  
"any order of removal shall be proceeded  
"upon, unless *reasonable notice* be given by  
"the church-wardens or overseers of the pa-  
"rish or place who shall make such appeal,  
"unto the church-wardens or overseers of the  
"parish or place from which the poor person  
"shall be removed; the reasonableness of  
"which notice shall be determined by the  
"Quarter Session to which the Appeal is made  
"and if it shall appear to them that *reasonable*  
"time of notice was not given, then they shall  
"adjourn the said Appeal to the next Quarter  
"Session, and then and there hear and deter-  
"mine the same."

And by 5 Geo. 2, c. 19, "on all Appeals to  
"the Sessions against the judgments or orders  
"of any Justices of Peace, the Sessions shall  
"cause any defect of form that shall be found  
"in any such judgments or orders, to be rec-  
"tified and amended without any costs to the  
"parties concerned; and after such amend-  
"ment shall proceed to hear, examine, and  
"consider, the truth and merits of all matters  
"concerning such judgment or orders; and  
"examine proofs relating thereto, and make  
"such determinations as if there had not been  
"any defect or want of form.

And by 16 Geo. 2, c. 18, "It shall be law-  
"ful for every Justice of Peace to execute all  
"acts appertaining to his office, so far as the

" same relates to the laws for the relief, main-  
" tenance, and settlement of poor persons ;  
" notwithstanding any such Justice is rated to,  
" or chargeable with, the taxes, levies, or rates,  
" within any parish, township, or place, affect-  
" ed by any such act of such Justice. Provided  
" that this act shall not authorize any Justice to  
" act in the determination of any appeal to the  
" Quarter Sessions for any county or riding,  
" from any order, matter, or thing, relating  
" to any such parish, township, or place,  
" where such Justice is so charged or charge-  
" able."

And by 8 and 9 Will. 3, c. 30, for the more effectually preventing of vexatious removals and Appeals, it is enacted, " That the Justices of the Peace of any county or riding, in their General or Quarter Sessions of the Peace, upon any Appeal before them, there to be had, concerning the settlement of any poor person, or upon any proof before them there to be made, of notice of any such Appeal to have been given by the proper officers to the church-wardens or overseers of any parish or place (though they did not afterwards prosecute such Appeal,) shall, at the same Quarter Sessions, order to the party in whose behalf such Appeal shall be determined, or to whom such notice did appear to have been given, such costs and charges in the law, as by the said Justices in their dis-

“Retention shall be thought most reasonable  
“and just, to be paid by the church-wardens,  
“overseers; or any other person against whom  
“such Appeal shall be determined, or by the  
“person that did give such notice; and if the  
“person ordered to pay such costs shall live  
“out of the jurisdiction of the said Court, any  
“Justice where such person shall inhabit, shall,  
“upon request to him made, and a true copy  
“of the order for the payment of such costs,  
“produced, and proved by some credible wit-  
“nesses upon oath; by warrant under his  
“hand and seal, cause the money mentioned  
“in that order to be levied by distress and sale  
“of the goods of the person who is ordered  
“to pay the same, and if no such distress can  
“be had, he shall commit such person to the  
“common gaol for twenty days.”

And by 9 Geo. 1, c. 7, “if the Court shall  
“determine in favour of the appellant, that  
“such poor person was unduly removed, then  
“the same Quarter Session shall award to  
“such appellant so much money as shall ap-  
“pear to have been reasonably paid by the pa-  
“rish or place on whose behalf such Appeal  
“was made, for the relief of such poor per-  
“son, between the time of such undue re-  
“moval, and the determination of such Ap-  
“peal: the said money so awarded to be  
“recovered in the same manner as costs and  
“charges upon an Appeal according to the 3  
“and 9 Will. 3.”

And the Court of B. R. will grant a ~~mans~~  
~~damus~~ to the Sessions to allow these costs.\*

On these statutes it has been determined, <sup>Defining A</sup>  
First, that by "defects in matters of form," <sup>form</sup>  
which the Justices are empowered to mend,  
are intended merely defects or mistakes in form  
apparent upon the face of the order, but not  
matters of substance.†

It has been found impossible to lay down  
precise rules for determining the exact bound-  
ary between matters of form, and those of  
substance, and on that account this regulation  
of the stat. was, on one occasion, called by  
Lord Kenyon, Ch. J. "almost a dead let-  
ter."‡

The most correct definition of matters of form  
is, perhaps, "that which appears palpable;  
without examination."§

Secondly, that the Appeal given is to *all* who may  
persons aggrieved, and therefore the pauper, <sup>appeal.</sup>  
as well as the parish, may appeal.||

But the Sessions cannot make an *original* or-  
der, having no cognizance but on Appeal ;¶  
and on that principle can only notice the par-  
ties before the court on the Appeal, and can-

\* 2 Sess. Ca. 67.

† 2 Bost. (Const. edit.) 828.

‡ Cald. Ca. 248.

§ Burr. S. C. 163.

|| Carthew's R. 222.

¶ Burr. S. C. 270.

not decide that the pauper's settlement is in a third parish.\*

*Appeal to be to the Sessions of the County.* Thirdly, The Appeal must be to the Sessions of the county, and not of any corporation, because otherwise it would be an Appeal *ab eadem ad eundem*.†

*The next Session.*

Fourthly, That "next Sessions" means next practicable Session ; and therefore that each case must, in some degree, be governed by its own particular circumstances. As a general rule, then, can only be derived by means of analogy from a source of so much uncertainty, the following cases are given by way of example.

Thus, in *Rex v. the East Riding of Yorkshire*, *Ea. 19 Geo. 3*, a *mandamus* was moved for, to receive an Appeal. The order of removal had been made by the two Justices on the 22d. September, but the pauper was not removed till the 5th of October. Hull, the place to which the pauper had been removed from Whitby, is 60 miles from Northallerton, where the Session began on the 6th of October ; at that Session no Appeal was entered ;—and at the Epiphany Session following, which began on the 12th of January following, the parish charged offered an Appeal ; the Justices refused to hear it, thinking themselves bound by the words of the statute, which says, "that

\* *Salk. 475.*

† *Burr. S. C. 592.*—*2 Bott. 724.*

persons aggrieved may appeal to the Justices of Peace at the next Quarter Sessions."—The Court said, "that by *next Session* the stat of Car. 2, must have meant the *next possible Session* ; and that here it was impossible for the appellants to lodge their Appeal at the Michaelmas Session."\*

So in *Rex v.* the Justices of Herefordshire, *Adm. 30 Geo. 3*, a *mandamus* was moved for, to compel the Justices to receive an Appeal against an order of removal. The order was made on Friday the 18th of April : on the 19th the pauper was removed, and on the Tuesday following, the 22nd, the Easter Session was held at Hereford, 20 miles distant from the parish to which the party was removed ; at which Session it is the practice not to receive any Appeal after the Tuesday morning. The parish not having appealed at the Easter Session, the Justices at the Midsummer Session refused to receive the Appeal, because not made at the *next Quarter Session* : the foundation of this application was, that as the officers of the parish to which the pauper was removed, had not sufficient time to convene a meeting of the inhabitants, in order to take their opinion upon the subject, whether there were any grounds for the Appeal, the Midsummer Session was the *next possible Session*.—

But by Lord Kenyon, C. J. "The words of the act of Parliament are very strong, and they require the Appeal to be made at *the Session next after the grievance*. Where indeed an order of removal has been made some time before, and only executed a very short time before the Session, so that there was no possibility of appealing to that Session, this Court has interfered, by granting a *mandamus* to compel the Justices at the following Session to receive the Appeal, because the words *next Session* mean *the next possible Sessions* ; but this is a very different case ; for there were two intervening days after the execution of the order, and before the Easter Session ; and if there was not sufficient time before such Session to give reasonable notice of Appeal, the Appeal might then have been adjourned according to the stat. 9 Geo. 1. c. 7."—The three other judges concurred.—*Mandamus* refused.

There have been many other, and even later, cases determined on similar grounds ; but these are sufficient to establish the principle as well as to lay down a rule for discrimination among cases possessing features of general similarity.

It must however be further observed also, that "*Sessions*" means *Quarter Sessions*, and not

\* 3 Term R. 504.

† R. v. J. of Dorsetshire.—15 East's R. 200.—R. v. J. of Sussex.—Id. 206.

General Sessions, although such should intervene.\*

With respect to the *reasonable notice*, directed by the 9. Geo. 1. What shall be deemed reasonable notice must be regulated by the circumstances of each particular case, but *also*, in some degree, by the practice of the Court, before which the Appeal comes; for it is incident to every Court to lay down such certain rules for its own proceedings, as will afford the most general accommodation to its suitors, to which rules, therefore, such suitors are bound to pay a general obedience.

And although reasonable notice may not have been given, the Session, cannot for this *quash the order of removal*: it is only a ground for *adjourning the Appeal*.—Thus in *Tr. 10 Geo. 1.* the Session, quashed an order of Justices, and assigned for a reason, “that there was not due notice given of the Appeal,” pursuant to the stat. 9 Geo. 1.—But by the Court, “The order of Session must be quashed, because due notice not being given was no reason to quash the order of two Justices, though it might be a reason to adjourn the Appeal.”†

Neither can Sessions *refuse to receive Appeals*, on the ground that due notice was not

\* 15 East's R. 692.

† Foley 261.

given : for the notice relates only to the hearing, and not to the receiving the Appeal.—Indeed they are bound to receive an Appeal against an order of removal, although no notice has been given.\*

And after receiving it, if they are satisfied that notice sufficient for trial could not have been given, they may respite the hearing ; but of that sufficiency all Sessions are to judge.

An order was made on the 26th of November, and executed on the 28th : the appellants attended the next Quarter Session held on the 13th of January following, and moved the Court for leave “ to lodge the Appeal, and to respite the hearing thereof,” to the then next General Quarter Session. The following entry was made by the Session : “ For as “ much as it appears to this Court that there “ has been sufficient time since the removal of “ the paupers for the appellants to give notice, “ and come prepared to try this Appeal at this “ Session, and no cause shewn why they did “ not proceed accordingly ; it is ordered that “ the motion for lodging the same, and respiteing “ the hearing to the next Quarter Session, be “ rejected.”—The Court of B. R. were of opinion “ that the Justices had not acted wrong, for the motion was in effect to adjourn the Appeal ; and it was evidently the intention of the par-

ties not to enter the Appeal, *unless the Court would adjourn it*; the Justices are to judge of the reasonableness of the time; and in some counties they establish a rule, regulating the time of notice; here it appears that the order of removal was executed on the 28th of November, so that there was sufficient time for the appellants to give notice, and to come prepared to try it; and the Justices who are to judge of this thought so."—*Mandamus* refused.\*

In a later case, an act of inclosure having given an Appeal to the next Session, within six months after the cause of complaint; an appellant moved the Court of Session in due time "to receive his Appeal, and respite the hearing of it till the next Session;" this was refused by the Justices, because the following Session would not happen before the expiration of the six months; a *mandamus* was moved for, to compel them to receive this Appeal; the Court of B. R. however, were clear that the act was compulsory on the Justices "to receive the Appeal, but not "to respite it;" yet they said, as this was a conditional motion, "only to enter the Appeal, *in case* the Sessions would agree to "respite the hearing." they could not compel the Justices to receive it afterwards.†

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\* 3 Term R. 150.

† 4 Term R. 438.

Court of B. Notwithstanding, however, that Sessions K. have a jurisdiction respecting the reasonableness of notices, it must be a sound discretion, and they may not exercise it capriciously; for, as was said in that case by Lord Ellenborough, Ch. J. "The Court of King's Bench have a kind of visitatorial jurisdiction over them, by which they will correct the errors of Justices."<sup>\*</sup>

Overseers of As was recently observed on another occasion, the Courts of Quarter Session having no original jurisdiction in the appointment of the poor, they can exercise no authority over the matter, but by Appeal, and, therefore, with that part of the subject alone, have we any concern here.

Their jurisdiction, through the medium of an Appeal, over the appointment of overseers, extends to those appointing, as well as to those appointed; for, by the statutes in which originates the whole system, it is said, that "if any person shall be aggrieved by the determination of the Justices, he may appeal to the Sessions."<sup>†</sup>

Who may appeal. The person appointed may, therefore, appeal, and the grounds of such Appeal generally are, that the party is either in too high,

\* 10 East's R. 404.

† 43 Eliz. c. 2.—Antebedit by 17 Geo. 2. c. 38.

or too low, a situation of life, to be the object of the statute, or that there is some objection arising out of the sex, or other *personal* circumstances, of the individual.

The parishioners also, under the same description of "any persons aggrieved," may appeal, on account of the unfitness of the person appointed by the Justices.\*

Of the statutes lately referred to, that of Eliz. directs Appeals to be only "to the Quarter Sessions," generally; that of Geo. 2, "to the next General or Quarter Sessions." It is by no means settled that the latter is a repeal of the former statute, respecting the restriction of time for an Appeal, but in proceedings under the stat. of Geo. 2, sufficient explanation has been already given of the interpretation of the word "next."

At all events, costs can only be obtained in proceedings under the latter statute.

The rate itself presents the most frequent source of Appeal, on the ground of its ~~inequality~~ <sup>The rate for relief of the poor.</sup>

\* See Pract. Expos. *Title, Poor, OVERSEERS OF*, sect. 1.

† *Rex v. Justices of Dorsetshire*.—East's R. 200.—However, though it was said in this very recent case, by Lord Ellenborough C. J. that it was not settled, that one was a repeal of the other; there are some strong cases to shew, that such is the general understanding, especially *Rex. v. Coodp*, 1 Bott 235.—*Rex v. Micklefield*, 129d. Ca. 507.—*Rex v. Atkins*, 4 Term R. 12.

Court of B. Notwithstanding, however, that R. have a visitatorial jurisdiction, have the power of exercising a ~~discretion~~ specting the reasonableness of no be a sound discretion, and the exercise it capriciously; for, a case by Lord Ellenborough.

Court of King's Bench. Visitatorial jurisdiction over the poor will correct the error.

Overseers of the poor. As was recently decided in the Court of King's Bench, the Court of Appeal, the original jurisdiction of the overseers is not authority as by omitting to therefor legally liable to be rated. have & sufficient grounds of Appeal.

To the <sup>in</sup> their proper order. The sum of all parochial rating, is in the stat. of 26 Eliz. c. 2.

By that statute "the church-wardens and overseers of the poor of every parish, or the greater part of them, shall, with the consent of two Justices, (1 Qu.) dwelling in or near the parish or division, raise weekly, or otherwise (by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal-mines, or saleable underwoods, in the parish, in such sums of money as they shall think fit), a convenient

“**ax, hemp, wool, thread, iron, necessary ware and stuff, to set in work; and also money for the lame, impotent, old, blind, young poor and not able to work; putting out of poor children to do all other things con-**

“**iliffs, or other head- corporate and city, shall have the same election, as Justices County.”**

“**14 Car. 2, c. 12, which authorizes the Justices to appoint separate overseers for places that cannot have the benefit of 43 Eliz. c. 2, “The Justices of Peace within the said counties shall have like powers to raise and levy moneys, and to execute all other acts within every township or village, as is appointed for them to do within any parish.”**

“**And by 17 Geo. 2, c. 3, “the church-war dens and overseers and other persons authorized to take care of the poor in every parish or place, shall give public notice in the church of every rate for the relief of the poor, allowed by the Justices, *the next Sunday* after the same is allowed, and no rate shall be valid, so as to collect the same, unless such notice shall have been given.”**

**Illegality.** 1st. As to *illegality*. A rate is illegal in its origin and foundation, which is made for unlawful purposes, or which is made or allowed, by persons not having jurisdiction or competent authority.

**Irregularity.** 2dly. As to *irregularity*. That is when a rate is made and allowed by the proper parties, and legal in its commencement, but by some omission in its progress is rendered invalid.

**Inequality.** 3dly. As to *inequality*. A rate may be unequal in many ways. By rating all persons liable to be rated, but not in due proportions; by wholly omitting to rate some who ought to be rated; or by rating property which is not the subject of a rate, as well as by omitting to rate property which is legally liable to be rated. All of which are sufficient grounds of Appeal.

Of these in their proper order. The foundation of all parochial rating, is in the stat. of 43 Eliz. c. 2.

By that statute "the church-wardens and "overseers of the poor of every parish, or the "greater part of them, shall, with the con- "sent of two Justices, (I Qu.) dwelling in or "near the parish or division, raise weekly, or "otherwise (by taxation of every inhabitant, "parson, vicar, and other, and of every occu- "pier of lands, houses, tithes impropriate, "appropriations of tithes, coal-mines, or saleable "underwoods, in the parish, in such sums of "money as they shall think fit), a convenient

“ stock of flax, hemp, wool, thread, iron,  
“ and other necessary ware and stuff, to set  
“ the poor on work; and also money for the  
“ relief of the lame, impotent, old, blind,  
“ and others, being poor and not able to work;  
“ and also for the putting out of poor children  
“ apprentices, and to do all other things con-  
“ cerning the premises.

“ And the mayors, bailiffs, or other head-  
“ officers of every town corporate and city,  
“ being Justices of Peace, shall have the same  
“ authority within their jurisdiction, as Justices  
“ of the Peace of the county.”

Also by 13 and 14 Car. 2, c. 12, which au-  
thorizes Justices to appoint separate overseers  
in places that cannot have the benefit of 43  
Eliz. c. 2, “The Justices of Peace within the  
“ said counties shall have like powers to raise  
“ and levy moneys, and to execute all other  
“ acts within every township or village, as  
“ is appointed for them to do within any pa-  
“ rish.”

And by 17 Geo. 2, c. 3, “the church-war-  
“ dens and overseers and other persons autho-  
“ rised to take care of the poor in every parish  
“ or place, shall give public notice in the  
“ church of every rate for the relief of the  
“ poor, allowed by the Justices, *the next*  
“ *Sunday* after the same is allowed, and no  
“ rate shall be valid, so as to collect the same,  
“ unless such notice shall have been given.”

By 17 Geo. 2, c. 38, "overseers of the poor within every township or place where there are no church-wardens shall execute all the acts and powers concerning the relief of, or relating to, the poor, as church-wardens and overseers may do by this, or any former statute concerning the poor.

" And if any person shall be aggrieved by any assessment, or shall have any material objection to any person being put in, or left out of, such assessment, or to the sum charged to any person or persons therein, he may, giving reasonable notice to the church-wardens, or overseers, appeal to the next Session for the county, riding, division, corporation, or franchise; but if reasonable notice be not given, then they shall adjourn the Appeal to the next Quarter Session after;— provided, that in all corporations or franchises not having four Justices, the Appeal may be to the next *General or Quarter Session* for the county, riding, or division, wherein such corporation or franchise is situate.—And on all Appeals from rates, the Justices shall amend the same in such manner only as shall be necessary for giving relief without altering such rates with respect to other persons mentioned in the same; but if upon Appeal from the whole rate it shall be found necessary to set the same aside, then they shall order a new rate

APPEALS.

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“ to be made. And they may award reasonable costs on either side.

“ And copies of all rates made for the relief of the poor shall be entered in a book to be provided by the church-wardens and overseers, who shall take care that such copies shall be entered within fourteen days after all Appeals from such rates are determined, and shall attest the same by putting their names thereto; and all such books shall be preserved by the church-wardens and overseers, or one of them, whereto all persons assessed, or liable to be assessed, may resort, and shall be delivered over from time to time to the succeeding church-wardens and overseers as soon as they enter into their offices, and shall be produced by them at the General or Quarter Sessions, when any Appeal is to be heard.”

By 41 Geo. 3, c. 23. The difficulties which were found to arise from the partial amendment of rates, instead of quashing them entirely, are remedied by enacting that, “ where this mode takes place, the monies actually assessed upon other persons than the parties whose proportion has been thus altered on Appeal, shall be recoverable in the same manner as if there had been no such Appeal, and shall be deemed as payment on account of the next effective rate; that the monies ordered to be assessed upon any per-

" son, shall be recoverable in like manner  
 " as if they had originally been *so* inserted  
 " in the assessment ; and if any person's name  
 " shall be ordered to be struck out, or his  
 " assessment to be lowered, that such extra  
 " sum as he shall have paid over and above  
 " what was right, shall be returned by the  
 " overseers, with all costs, charges and ex-  
 " pences occasioned by such persons having  
 " paid or been required to pay the same,  
 " recoverable on refusal by distress and all such  
 " means as the poor rate assessment may by  
 " law be recovered.

" All notices of Appeals to be in writing,  
 " and served upon two or more of the church-  
 " wardens and overseers ; such notice to spe-  
 " cify the particular grounds of Appeal, and  
 " no other ground, unless by consent of parties  
 " to be gone into."

Taking a general view of these statutes then together, as forming a system, we have to examine the three objections of illegality, irregularity, and inequality, in the execution of them, premising only a few remarks on the technical interpretation of some expressions in these statutes, which are,

No rate till allowed. 1st. That *next Session*, with respect to *commencement* of reckoning, means, *next after allowance*,† for it is no rate till it has been al-

lowed, and therefore till then the other interpretation of the word *next*, which has before been explained, is not applicable.

2ndly, That an *adjourned* Session may take <sup>Adjourned Session.</sup> cognizance of the Appeal,\* and may adjourn again before they give judgment.†

3dly, That the notice of Appeal, when it is <sup>Names to be specified in an appeal.</sup> on account of *particular persons* being omitted, &c. must specify those particular persons *by name*: for otherwise it would be neither a notice of appeal against the rate generally, nor against the rate for partiality as to *individuals*.‡

4thly, That the power given to the Sessions <sup>No costs unless appeal have been heard.</sup> to award costs, presupposes the Appeal has been *entered, and determined*, and therefore unless such have been the case, although expences may have been incurred in preparing a defence, none can be given.§

A rate must *necessarily* be *illegal*, which is <sup>Illegality further explained.</sup> made in contradiction to the provisions of the statute which ordains it. Therefore a rate made as for a parish, or a vill, which is neither one, nor the other; or which is made, or allowed, by persons not having the authority which is specified by the statutes; or which

\* 7 Term R. 107.

† 2 Bott. 730.

‡ 1 Bott. 274.

§ 2 Bott. 757.

professes to be made by a greater, or a less, number of persons, than that to which the statutes have restricted the number of officers; is no rate at-all, and cannot be enforced by *mandamus* or any other legal process; for if the source be bad *ab initio*, that which flows from it cannot be efficient.\*

So, if the purpose for which the rate professes upon the face of it to be made, be unlawful, it is sufficient ground for resisting it.

A poor's rate can only be made for the relief of the poor; it therefore cannot be made to reimburse former overseers; for an overseer is not bound to lay out money before he has received it by a rate.—This was determined in Tawney's case, *Hil. 2 Ann.*—Tawney, being an overseer of the poor, laid out his money for their relief, and was turned out of his office before the end of the year, by which means he lost the opportunity of making a rate to reimburse himself. Upon this he obtained a *mandamus* directed to the church-wardens and overseers to make a rate to reimburse him, and it was argued, that there could be no such charge, neither by the common law nor by the statute. By Holt, Ch. J. “ We cannot order the parish nor overseers to make a rate to raise money to reimburse an overseer, but only to raise money for the relief of the poor, nor can

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\* 1 Burr. R. 445.—446.

they make a rate otherwise. The act of Parliament is expressly so, and must be pursued. An overseer is not bound to lay out money till he has it ; if he does, he must make a new rate for the relief of the poor, and out of that he may retain to pay himself. Tawney should have done so ; he trusted where he needed not have done it ; he has not pursued the means the statute gave him ; and we cannot relieve him." And by the whole Court, "The *mandamus* lies not."\*

And if the overseers make an assessment for the relief of the poor for six months prospectively, and a person rated thinks it objectionable on that ground, he may appeal to the Quarter Sessions ; and it has been generally laid down by the Court of B. R. that a prospective rate, from three months, to three months, was on the whole the most convenient method of rating.†

A rate may have a legal commencement, <sup>Irregularities</sup> but be rendered inefficient in its progress by <sup>Ditto.</sup> the omission of some form directed by the statutes. Therefore, if a poor rate be not published in the church *on the next Sunday* after it hath been allowed by the Justices, it is a nullity, and payment under it cannot be enforced, although it has not been appealed

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\* Salk. 357.—1 Doug. R. 116.

† 8 Mod. R. 10.—6 Term R. 599.

## APPEALS.

against at the Sessions: and Lord Kenyon, Ch. J. said, "it was a radical defect in the rate itself, which nothing could cure."\*

Inequality.  
Ditto.

To make a rate which shall not be liable to the imputation of inequality, every person *liable* must be rated; must be rated in *proportion* to his property; and *every description of property* must be comprehended in the rate, which *law and usage* have determined to be rateable.

The interpretations of law and usage, can only be collected from a succession of determinations, on each disputable point as it arose. The *inhabitancy*, and *occupancy* of the *Persons* rateable, have made two of the most important divisions of the general subject; the nature of the *property* rated, the other.

Rules of  
rating.

It is said by Dalton, "that the most reasonable way of taxing land, is according to the pound rate, and where a personal estate, as goods, money, or the like, is taxed, it ought to be in the same proportion as the lands, viz. the value of every 100*l.* at 5 *per cent. per ann.*"†

But the rent of houses or lands is no standing rule for making a poor-rate, for circumstances may differ.

And the Justices cannot make a *standing rate*; for if it be just at first, it may not be so after, for lands may be improved.‡

\* 4 Term R. 368.

† Dalt. c. 73. ‡ 2 Salk. 526.

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Neither is an assessment according to the land tax good;—for in the case of *Rex. v. Clerkenwell, Hill*, 2 Geo. 1, where a poor's rate was made according to *the land tax*; it was objected to as not being an equal taxation, because the personal estate in the public funds was not chargeable to the land tax, but that it is to the poor's tax. The whole Court, for that reason, set it aside.\*

And the Justices in Session are the proper judges of the *proportion or equality* of poor's rates—therefore in a case of *Rex v. the Churchwardens of Weobly*, Tr. 19 Geo. 2, the Court refused a *mandamus*, directing them to insert the names of particular persons in a poor's-rate, upon affidavit of their sufficiency, and being left out to prevent their having votes for Parliament men, “for that the remedy was by appeal, and this Court never went further than to oblige the making the rate, without meddling with the question who is to be put in, or left out, of which the parish officers are the proper judges, subject to an appeal.”†

But, if it clearly appear upon the face of the rate itself, or by the circumstances disclosed by the Justices on which they proceeded, that the assessments are unequal, the Court will quash the rate.‡

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\* Foley 12.      † 2 Str. 1259.

‡ Cald. Ca. 93—6 Term R. 154.

And the occupier of a house, or of an estate, ought to be rated according to its full value with all its improvements, and not according to the price which he may have paid for it, without taking into account the value of the improvements.\*

Criteria of rating.

And the lessee of lands ought to be rated according to the present value of the lands, if the same have become of greater annual value than the rents reserved by the leases.†

Certain occupiers of lands appealed to the Quarter Session against a poor's-rate, setting forth in their notice of Appeal, among other objections, that the rate was unequal and partial, because tenements and farms, consisting of houses, lands, or grounds, were in such rate or assessment charged and assessed 1d. in the pound, and cottages or dwelling houses at only three farthings in the pound ; whereas such cottages or dwelling houses ought to have been rated and assessed on a par with tenements and lands at 1d. in the pound. Upon hearing this Appeal, the Session quashed the whole rate, and ordered a new equal assessment, stating the following case for the opinion of the Court.—“ That it was proved on hearing the Appeal, that the rate was made with the above distinction as to lands and cottages ; that from

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\* 6 Term R. 154.

† 7 Term R. 549.

the year 1735 to 1776 a constant distinction had been observed in rating houses and lands, the former having always been rated in less proportion to their rents than the latter; that the land in general is burthened with no particular charges that are not incident to land in general; but that both lands and houses are subject to the usual repairs and taxes generally incident to each respectively."—The proceedings having been moved by *certiorari*, the case was argued in the Court above, and in support of the order of Session it was said, that in this parish there were circumstances which well warranted an equal assessment on each species of property; and it was suggested that *nine-tenths of the burthen of the poor arose from the houses.*—By Lord Mansfield. "There can be no general rule as to the proportion between lands and houses. It must depend on particular local circumstances. There are no circumstances stated in this case to shew, that houses ought to be rated lower: and if what is suggested be true, that is a strong circumstance the other way.—The objection unavoidably goes to the whole rate; for it is made *throughout* by a rule and proportion which the Justices thought wrong; and therefore they could not amend, and could do nothing but quash the whole."—The order of Session confirmed.\*

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\* *Cald. Ca. 105.*

What persons and property liable.

We now come to consider the last point alone, viz. *What persons, and property, are liable to be rated.*

These we see are described by the statute to be “Every *Inhabitant*, parson, vicar, and other; and of every *occupier* of lands, houses, tithes impropriate, &c. coal mines, or saleable underwoods *in the said parish.*” So that *Inhabitancy, Occupation, and Locality*, form the foundations of rateability; and the rate ought to be made according to the *visible estate* of the inhabitants *both real and personal*, but none is to be taxed to contribute to the relief of the poor in *one* place, on account of the estate he has elsewhere in any *other* town or place, but only in regard to the *visible estate* he has in the town where he is rated; and, as has been frequently said by the Court, where personal property is rated, it must be *local visible property within the parish.*

But although a person *dwell* in another parish, yet in whatever parish he has lands in his proper possession, “he is there,” says Lord Coke, “in law a parishioner; for the place where he lies, sleeps, or eats, does not make him a parishioner there *only*; but as he occupies lands elsewhere, *that* makes him also elsewhere a parishioner *as to this purpose*; for if he should not be charged for those lands which he himself occupies, then no person would be charged with them, and it might happen that

a person who inhabits in one town, might occupy the greatest part of the lands lying in another, for which no rate could be obtained."

And if a man uses only part of a house, he is to be considered as in the occupation of the whole, and rated accordingly, although the rest is unoccupied.\*

It seems that no *persons* whatsoever, or, at least, no subjects are, in respect of their landed property, so privileged as to be exempt from this contribution. Neither are any *places* exempted, unless as being appropriated to some public, or charitable, or religious purposes.†

Thus, it has been adjudged, that a *bishop's palace* is rateable, because there can be no prescription against the payment of this tax.‡

So a *corporation* seised in fee of lands for their own profit, are, (within the meaning of 43 Eliz. c. 2.) *inhabitants* or *occupiers* of such lands; and in respect thereof liable, in their corporate capacity, to be rated to the poor.§

*Royal palaces*, in the occupation of the Royal family, are indeed, by particular provision, not rateable to the poor: yet *servants* occupying separately house and land belonging to the crown, whether they pay for the same, by *rent*, or *service*, are rateable.||

\* 4 Term R. 447.

† Cald. Ca. 152.

‡ 3 Keb. R. 572.

§ Cowp. R. 79.

|| Cald. Ca. 1.

So, if the scite of a palace be demised to a subject, for a certain permanent interest, the grantees that occupy it are rateable for such property to the poor ; for when the public purposes, which constitute the great ground of exemption, are no longer answered, the property no longer retains this privilege.\*

So, also, the ranger of a Royal-Park is rateable to the poor for the inclosed uncultivated lands in the park, yielding certain profits ; but not for the *herbage and pannage* (which is the surplusage above the sufficient pasture of the game therein), which yields no profits.†

But stables rented by the colonel of a regiment of horse by order of the crown, for the use of the regiment, are not rateable to the poor ; for neither the possession of the crown, or of the public, are liable, and the stables thus used must be considered as in the occupation of the public.‡

These instances are sufficient to shew what is to be considered *public* property, or property dedicated to public purposes, therefore, exempt from public burthens ;—wherefore, in addition to what has been advanced, it is sufficient to remark, on that particular

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\* Cald. Ca. 153.

† 2 H. Black. Rep. 265.

‡ 2 Term R. 372.

view of the subject, that, where the commanding officer in barracks had distinct apartments allotted to him, one in particular for transacting the business of the regiment, and the others fitted up for the accommodation of himself and family who resided there with him, containing, among others, *kitchen, wash-house, and coach-house, together with a stable-yard and garden*: the latter were held rateable to the poor, but the former exempted.

And where persons have been appointed to the management of charitable institutions, the premises assigned for their habitation being part of their emolument, have been considered in the same light.

In other cases, upon the general principle that that which yields profits is rateable, chapels and meeting houses have been held so, where they *yielded profit* by letting out the pews, or by any other means.

This question was fully considered in a case of *Rex v. Agar*, so late as 51 Geo. 3, and the general doctrine before laid down, definitively established. The only ground, on which liability to be rated was strenuously called in question in this case was, that, although a great profit was made of the seats, &c. by trustees, in whose hands the property, and interests connected with it, were placed, the expences

of obtaining preachers, &c. had exceeded the receipts. But the Court observed, "that the sums expended on Preachers, &c., were voluntary payments in the first place, not necessary deductions, but that, be that matter as it might, the property was in its own nature of a rateable description, and profit upon it passing through the hands of the trustees, must, according to the universal principle, be rateable."

**Beneficial occupation, What is so.**

For in all such cases the two great considerations which must decide the question of rateability, are, whether there be an *occupation*, and *that a beneficial one*. The whole subject, so far as regards this point, appears to be comprehended in what was said by the Court of B. R. in one case, which was that of a female *appointed to take care of a house of industry*, but having *no distinct apartment for any purpose of personal convenience*. They said, "the question is, Whether this person so acting as a servant is to be rated to the poor, as the supposed occupier of this house ?

Now if it be sufficient to live in the house, it might as well be said that, where a person having a coach-house, or a laundry, at a small distance from the mansion-house, permits the coach-man to live in the one, or the dairy-maid in the other, these servants should be considered as the occupiers of these tenements, so as to be rated for them. A person so si-

tuated is only a servant, and not an occupier, either in the legal, or common, acceptation of the word. The legislature only meant that *beneficial occupiers* should be rated; therefore upon this principle it is that, where a profit arises, of *whatever nature the institution may be*, the party benefitted shall, in proportion to the advantage he derives, be assessed to the poor. But where the occupation is not a *beneficial occupation*, there is nothing whereon the rate can attach.”\*

Thus much for that string of cases which regard an occupancy that is undisputed, coupled with a locality that is ascertained, but with some ambiguity respecting the term “*beneficial occupation*.” We now come to those where the locality becomes a question of controversy, either with a view to the property to be rated, or to the mode of rating it. The subject is indeed, susceptible of still further subdivision, and much variety of discrimination, but the professed design of the work restricting it to a superficial, and merely elementary, discussion of general subjects, it will allow of little more than a mere enumeration of items which are comprehended under the term “*rateable property*.”

The statute itself places *lands, houses, tithes, coal-mines, and saleable underwoods*, beyond

controversy, simply considered as such, without any adventitious circumstances annexed to their occupation, to make their rateability doubtful.

Under the term *land*, every thing arising immediately out of land has, by construction, been considered rateable. Thus, lime-works, potter's clay-pits, stone quarries, land, covered with water and yielding a profit in tolls, in fish, in a dock, or in any other manner, not exclusive of, but connected with, the land; mineral springs, arising out of the land and occupied with any, the smallest portion, of the land; are all rateable, because the land is the foundation of their rateability. A single case or two will illustrate the position.

**Land: What** A person renting a quantity of land, together ~~comptized~~ with a mineral spring thereon arising, at a term by construction. gross yearly rent, was held rateable to the poor in respect to the whole of such rent, though in fact the annual value of the land, *independent of the spring*, is only in the proportion of two to eight of the reserved rent; for the profits arising from the spring are to be considered as part of the produce of the land. It was the case of *Rex v. Miller*, *Tr. 17 Geo. 3.* and it appeared that the Defendant was a lessee of certain lands, containing about four acres with buildings thereon, and a certain well of mineral water thereout arising, called the Cheltenham Spa, at the yearly rent of 100*l.*

that the lands and buildings thereon, *independent* of the well, were of the annual value of about 20*l.*; that the rent for the mineral water is 80*l.* that the profits of this mineral water to the lessee, arise from the sale thereof, and the company resorting thereto, which is very various and uncertain; and that the lessee was rated for the premises at 5*l.* which is equal to a rate of 100*l. per annum* for lands in the said parish.—Lord Mansfield. “ Nothing can be plainer than the present case. This is not a rate upon the profits of the well, but upon four acres of land, let to the defendant at 100*l.* a year; and the value rises partly from the buildings, and partly from the spring that produces the mineral water; therefore the profits of the spring are part of the produce of the land, and as such, I am clearly of opinion, it ought to be rated.”\*

The tolls of a sluice on a navigable river were held liable to be rated in the case of *Rex v. Cardington, Ea. 17 Geo. 3.* In this case it appeared that Ashley Palmer, Esq. was seised in fee of the right of navigation of that part of the river Ouse, which lies between Erith in the county of Huntingdon, and the town of Bedford; and of all the tolls, payable for the carriage of coals and other com-

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\* *Cowp. R. 619.*

modities upon that part of the navigation. That he hath power to erect sluices and staunches for keeping up the water and carrying on the navigation ; and that the said tolls are paid for passing through every sluice ; and in a different rate for different sluices. That several sluices had been erected, and in particular one sluice across the said river in the parish of Cardington, at which the toll is three pence per chaldron or load weight. That Mr. Palmer did not reside in the parish of Cardington, nor has he any person resident at that sluice to receive the tolls ; but that the tolls for that sluice were received at Barford or Eaton. That neither Mr. Palmer, nor any of the former proprietors, were assessed to the poor's rates for their sluices, or for the tolls or profits, but they have been for many years assessed to the land tax. That the parish had lately assessed Mr. Palmer to the poor's rates for the said sluices.—The Court decided, that these tolls were rateable ; and therefore affirmed the rate.\*

But the question was, to all appearance, put beyond all future controversy in a case of *Rex. v. Sir Arch. Macdonald, and others*, the 23 of Geo. 3, in the judgment on which it was said by Lord Ellenborough, Ch. J.

“ Tolls are not rateable *per se*, but when con-

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\* *Cowp. R. 581.*

ected, and rated conjunctively, with real and substantial property, situated in the parish, as yielding profit there *by means of tolls*, they are a proper object of rating within the act of Elizabeth."

On the other hand, it has been decided that the *casual profits* of a manor ; tolls *per se*, and <sup>nected with,</sup> but not arising attached in any way to land ; a mere right <sup>out of,</sup> <sub>land.</sub> of *way over* land, without any interest in the land itself ; a drain, producing no beneficial interest, &c. are *not* rateable.

Thus, the defendant was rated to the poor in respect of certain *way-leaves*, or *liberties of passage*, over certain lands in the township of Harraton, Durham, rented by him for conveying and carrying his coals worked out of his coal-mines and collieries in Walbridge to the river Wear, and there lodging the same in his staith till they are put into keels or lighters, and carried down the said river to the port of Sunderland, in the said county, to be there put on shipboard, at the yearly rent in the whole of 752*l.* 4*s.* being the amount of what he paid annually for such way-leaves or liberties of passage to the several owners of the lands through which the same way-leaves, or liberties, of passage are granted. On the Appeal, the Session confirmed the rate, subject to the opinion of the Court. Ashurst, J. "It can-

not be said that the defendant was an *occupier* of any thing ; for all that he has is a concurrent right given him of making use of this way-leave at so much per ton for all the coals that he should carry, which is nothing more than a purchase of the liberty of carrying every ton of coals. This defendant has only a bare licence, and in respect of such licence he is not liable to be rated."—Buller, J.— "This is only a bare right of passage, which is an easement, and not a grant of the profits of the land. And it is admitted that if it be only an easement, it is not the subject of a rate ; if he were rated for this, it would be a double rate. In the case of tolls, it is not he who pays, but he who receives the toll, that is rated. Great inconveniences would result from rating every way-leave ; for if a neighbour were to give a right of passing over his field merely out of friendship, and no rent were paid for it, such liberty of passage would not be the subject of a rate, because the land can only be rated in the hands of the occupier ; but if he were to make an advantage of it, as such it may be rated in his hands. But where the party has the exclusive possession of the soil over which the waggon

way passes, he may be rated to the poor's rate as the beneficial occupier thereof."\*

The profits of any thing attached to a house<sup>Houses,</sup> are for the purpose of rating, considered as<sup>what com-</sup>  
<sup>prized under</sup> part of the house itself.

The mayor and burgesses of Gloucester were possessed of a house in the parish of St. Nicholas; and, being so possessed, erected a machine in a street leading by the said house for the purpose of weighing waggons. The Court said, "It is like the case of the Cheltenham Spa. There is an extraordinary profit arising from this modification of the enjoyment. The only question therefore is, whether a man shall be rated for the property he has? If a house to-day is let for 30*l.* *per annum*, and to-morrow, if turned into a shop, would let for 50*l.* when it is turned into a shop it shall be rated at 50*l.*"†

And upon the same principle, a house with a carding machine for manufacturing cotton, described in the rate as an engine-house, and both let and occupied together, though it did not appear whether the engine was fixed to the building, was considered as an entire subject, and to the extent of their value rateable to the poor.‡

Tithes, either when retained in the hands <sup>Tithes.</sup> of the Parson, or let for a modus, are titheable;

\* 7 Term. R. 578.      † Cald. Ca. 262.

‡ Id. 266.—1 Term. R. 721.

but if a Parson let all his tithes to one person, which person let them again, to each parishioner his own share, the first Lessee is then the *Occupier*, and the person to be rated, for they are not to be rated twice over.\*

**Coal mines.** *Coal mines* are among the descriptions of property enumerated in the statute as rateable, and it has been attempted, by the argument from analogy, to make all other mines generally rateable. This however has been resisted by the Courts, which have uniformly decided, that coal mines being rateable *en nomine*, according to the letter of the statute, stand on quite a different ground from any other. If demised for a rent they are rateable accordingly by the stat: whether producing any profit, or not; and rateable for profit beside, on the general ground, like all other property. But no mines of other kinds are rateable *quasi mines*, but like all other property on their produce in the hands of beneficial occupants. These positions are fully illustrated by the following leading cases, which have been confirmed by many others.

**Lead mines.** Plaintiff, who had been distrained for non-payment of a poor's rate, and thereupon brought his action, was lessee under the crown, of "all mines of lead, with their appurtenances, " within the soke and wapentake of Wirk:

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\* Str. 524.

† 8 East's R. 387.

"worth, with the lot and cope within the said  
"soke and wapentake, under the yearly rent  
"of 144*l.* The rate was for lot and cope at  
"500*l.* per annum, 13*s.* 10*d.*" The duty of  
lot, payable to the plaintiff as lessee of the  
crown, is the *thirteenth dish* or measure of lead  
ore got, *dressed*, and made *merchantable*, at  
all the lead mines within the said soke. The  
cope is 6*d.* for every load or nine dishes of lead  
ore *raised* at such mines. The said duties are  
paid to and received by the plaintiff, *without*  
*any risque or expense* in working the mines  
in the year 1775, the duties amounted to the  
clear sum of 500*l.* but they are *uncertain*, and  
*vary* every year.—By Lord Mansfield (who de-  
livered the opinion of the Court). "The poor's  
rate is not a tax *on the land*, but a personal  
charge *in respect of* the land, and which is  
not charged at all before to the poor. In ge-  
neral, the farmer or occupier of land, and not  
the landlord, is liable to this tax; for it arises  
by reason of the land in the parish; and the  
landlord is never assessed for his rent; because  
that would be a double assessment, as his lessee  
had paid before. *Lead-mines* are not within  
the statute of 43 Eliz, c. 2. They are in them-  
selves uncertain, and may prove unsuccessful  
to the adventurers. Taxes therefore upon the  
adventurers would be hard, and they are ex-  
cused. But the person, lord, or landlord,

who, in case they do prove of value, receives a stipulated benefit from the profits or value of them, is not excuseable upon the same ground, and therefore is expressly charged to the land tax, as that falls upon the landlord. He is alike liable to the poor's rates, for his visible real property in the parish ;—though, where the poor's tax is a charge on the lessees, the landlord does not pay in respect of his rent. Where the adventurer, or lessee of the mine, pays nothing, it is no double tax in any light ; because the lord pays, *not* for that, which the *lessee* or adventurer is *excused* from paying for, but the lord pays for his *own*. It is not a mere casual profit, but an annual revenue, *if any*, and very different from the casual profits of a manor, which are not annual, for there may be none for years. But *if the mine produces profit to the miner, the lord's share is certain, annual*, and an annual rent is paid for it constantly. The miner is obliged to pay certain proportions to the owner of the land. What reason then is there to exempt these proportionable revenues ? It makes no difference to the adventurer ; it does not prejudice or benefit him. But as such obligatory payment is in respect of the land, the land-owner ought not to receive it clearer or neater than any other part of his estate, when he is at no trouble, expense, or possible risk. There-

fore we are all of opinion, that the plaintiff is liable to be rated for this property.”\*

But that the lessee of a coal mine is liable to be rated, though he derive no profit from the mine, was decided in the *Rex v. Parrot and others*, *Eg. Ter.* 34 Geo. 3. The defendants, who were lessees of some coal mines, appealed to the Session against a poor rate, which was there confirmed, subject to the opinion of the Court of B. R. as follows: The appellants held the colliery, for which they were rated, under a lease, which being lost, parol evidence was given of its contents. The lessees were bound by ~~covenant~~ to work the colliery, and they were bound to pay to the lessees a sixth part of the money produced by the sale of the coals, with, out any deduction, on account of the expense of working: it was proved that, upon an average of the last three years, the appellants had paid 300*l.* 15*s.* 7*d.* to the lessors, as the sixth part of the money produced by the sale of the coals got from the colliery, during that time; that by paying this to the lessors, and also the expences of working the colliery, the lessees had lost two farthings, and half a farthing on every ton of coals got from the colliery; that the colliery had always been, and still was, a losing adventure from the time of it's being first taken by the appellants; that they must

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\* *Cald. Ca.* 155.—*Cowp. R.* 931.

have known that it would be a losing adventure at the time when they took it; and their inducement for taking it was, that when they had worked out the coal in this colliery, they would be able to get coal of their own, which was adjoining to it; and that this was a cheaper way of getting at it, than any other which they could have adopted. It was admitted, that, generally speaking, coal mines are rateable under the stat. 43 Eliz, c. 2, which expressly mentions them; but it was contended that this rate is a tax on the possessors of property yielding a clear and visible profit; the words of the statute being, '*according to their ability*', and that ability must be estimated by actual profits; and in this case it is expressly stated, that the lessees, so far from receiving any profit whatever, since they have been in the occupation of these mines, have actually been losers by the adventure;—that according to all the preceding cases, if any person were rateable here, it was the landlord in respect of his rent, and not the lessees, who it is found derived no profit whatever, after deducting the expences of the adventure.—By Lord Kenyon, Ch. J. “ It is said that this burthen is to be laid where the benefit arises; but that rule cannot hold in a variety of instances that might be put. Suppose a landlord make so hard a bargain with his tenant, that the latter derive no benefit from the farm, must not the tenant be rated to the

poor? the landlord certainly is not liable. This case differs from one of *Rowles v. Gell*, in this respect, which was the case of lead mines, *not rateable under the stat. of Elizabeth*, and there the question was, Whether or not the lessee was rateable for certain annual profits which he received without any risk on his part. But here the property is rateable under the express words of the stat, 43 Eliz, c. 2.—It appears in this case, that there has been a clear profit of 1000*l.* a year. The appellants objection in this place is that they have made an unprofitable bargain with the lessors. *That we cannot examine into.* It is sufficient that they are occupiers of rateable property.”\*

In a case of a coal mine being *worked out*, <sup>Colliery exhausted,</sup> and producing no profit to any one, Lord El- lenborough, Ch. J., said, “Where the mine is exhausted, the subject matter of profit is gone, although the rent, which was calculated upon the *probable* average produce of the whole term, may still be payable. With respect to the parish, the occupier is rateable for the *concurrent annual value during the period* for which the rate is made, and when the thing which he occupies no longer affords *such concurrent value*, the subject matter of rating is gone.”†

Saleable underwoods are the last species of <sup>Saleable un-</sup> <sub>derwood.</sub> rateable property designated *by name* in the

\* 5 Term R. 593.

† 8 East's R. 387.

statute we have been examining, and it has been determined that they are rateable annually, to the relief of the poor, in proportion to their value, *though they should happen not to be cut down oftener than once in 21 years*; and such property is, at all times, rateable according to the improvement in its value, or in the rent which might be fairly expected from it; for it is not necessary, that any of the profits should have been actually reaped, or taken away from the property, during the period for which the rate is made.\*

**Personal property.**

The difficulty of ascertaining Locality, which we must have observed all along to have entered so materially, and so generally, into the consideration of rateability, with respect both to *persons* and *property*, constitutes a larger portion than ordinary of the consideration, in determining the rateability of purely personal property, as will appear from the following cases in conclusion of the subject. It was long a doubt whether property *purely personal*, was under *any* circumstances, rateable; next, to *what descriptions* of personal property the liability attached; thirdly, when it was of a *transitory kind*, *where* it became liable.

In a case of *Rex v. Andover*, in the 17 of Geo. 3, when the liability of personal property was a question much discussed, it was

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\* 10 East's R. 210.

said by Aston, J. "that there are a great many cases which say that local visible property, may be rated: but the question is, *how* it must be done? Suppose it were done by the overseers; if notice be given to the several persons rated, and they think themselves over-rated, they have an Appeal to the Sessions. So; if a house has been usually rated for the house and stock in trade altogether, the rate is so specified; and if the person has an objection because he is mounted too high, on an Appeal, all that is a matter to be laid before the Justices in Session, who act as Jurymen with respect to the fact, and as judges as to the decision. Then the immediate point specified in the Appeal is produced, and notwithstanding the usage, if upon the general question, it should turn out to be the law that personal property is ratable, then it must indeed be rated, though it never was so before."

Also in *Rex v. the Justices of Canterbury, Mic. 9 Geo. 3.*—Lord Mansfield said. "To be sure, personal property is within the act of 43 Eliz. c. 2, and yet it is almost impossible to rate it, for it would be compelling persons to discover their debts."

And in another case the Court said, "The Stock in personal property and stock in trade, to be

liable, ought to be visible, liquidated; and ascertained: not casual, fluctuating, and uncertain."\*

Also in *Rex v. White*, *Tr. 32 Geo. 3.* Lord Kenyon said that the expression of Yates, J. in the last case was "if personal property be "rateable, it is not to be done *at random*, and "to leave the party rated to get off as he can; "but the officer making the rate, must be able "to support what he has done by evidence; "and no personal property can be rated, but "the clear liquidated surplus."†

In a case of *Rex v. Ringwood*, *15 Geo. 3.* three persons were possessed, as co-partners, of stock, in the trade and business of common brewers and maltsters, to the value of 4000*l.* for no part of which they were assessed, and the Session upon Appeal had quashed the rate, and ordered a new one. The question coming before the Court of B. R. by a special case, it was decided, on its having been the duty of the Session to have *amended*, not quashed the rate; but Lord Mansfield took occasion to say, on the general subject of rating stock in trade, "that in attempting to rate this stock they would have discovered the wisdom of conforming to the practice of not rating it. If they had tried to have amended

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\* 4 *Term R.* 771.

† 4 *Burr. R.* 2291.

it, how would they have rated this stock? Are the hops, and the malt, and the boiler, to be rated at so much for each? or is the trader to be rated for the gross sum which his whole stock would sell for? If the Justices had considered, they would have found out the sense of not rating it at all; especially when it appears that mankind has, as it were, with one universal consent, refrained from rating it; the difficulties attending it are too great, and so the Justices would have found them."\*

But where it has been *the usage* in a parish to rate persons to the poor for their stock in trade within the parish, there can be no doubt but such persons are liable under 43 Eliz. c. 2, to be rated to the poor in respect thereof. *Rex. v. Hill, Tr. 17 Geo. 3.* †

So, in *Rex v. Dodd, Hil. 22 Geo 3*, where upon an Appeal against a poor's rate, the Session confirmed the same, and stated that it had been *usual and customary* from 43 Eliz. " and ever since the existence of rates for the relief of the poor, to rate and assess the inhabitants, for, and in respect of, their personal property or stock in trade," it was insisted in support of the rate, that an uninterrupted usage and custom of rating this species of property, from the very date of the

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\* Cowp. R. 326.

† Id. 613.

statute down to the present time being expressly stated, this question was no longer open to argument. — The order of Session confirming the rate, was affirmed.\*

Also in *Rex v. White and others*, *Tr. 32 Geo. 3.* it appeared that a poor's rate for the parish of St. James, in the town and county of Poole, was 1*d.* in the pound on all lands, and 3*d.* for 100*l.* of personality, and that "it was usual in that parish to rate the inhabitants for their personal property." According to this proportion, one person was rated for his personal property, consisting of stock in trade as a shopkeeper, in the sum of 300*l.* and it was admitted to be rateable.†

In the same case, White was also rated in the sum of 13,500*l.* for his personal property, which consisted of certain ships or vessels in the Newfoundland trade from the town of Poole, in the said parish; and of monies charged on lands lying out of the parish.—By Lord Kenyon, Ch. J. "In a case in Bulstrode, it was said, that the rate should be on persons in respect of visible property, locally situated within the parish. Then applying that rule to this case, I think that the ships are rateable; this parish is their home, and must be so considered for their register. But with regard to the money lent on real secu-

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\* *Cald. Ca. 147.* † *4 Term R. 771.*

ties, I think that it cannot be rated; for it is stated, that the money was lent by persons out of this parish on *landed securities elsewhere*. This, therefore, is not personal property in the parish.—The other Judges concurred.

Another person was by the same rate as <sup>Household</sup> ~~furniture~~ assessed in respect of his household furniture; but the Court held "that the same was not rateable to the poor; for it is an expence to the owner, and produces nothing: it is the means by which he occupies, not by which he gains his livelihood; and a man might as well be rated for the food he eats, or the clothes he wears."

There was also in the same rate an assessment upon a person in respect of 1000/- principal money in hand, but it was determined that the owner thereof was not rateable. For by Buller, J. (to which the other Judges assented) "the reason that household furniture is not rateable, namely, because it does not produce any profit, must also govern this;—it is stated that the owner has it in hard money, and therefore we must take it, upon this state of the case, that it does not produce profit. Besides, money cannot be rateable within this act of Parliament.—For the legislature could not intend that inquiry should be made as to every guinea which a man has in his pocket. If the rate be confined to visible property, yielding profit to the

parish, there will be no difficulty in adhering to that rule; but it will be dangerous in the extreme to extend it further, and to look into every man's bureau to see what money he has there.”\*

**Stock in the public funds** Stock, or money in the public funds, cannot be rated to the poor rates under the statute of Eliz. nor under any private act, which authorizes the rating of persons in respect of money out at interest.—This was decided in *Rex v. St. John Maddermarket, Hil. Ter. 45 Geo. 3*, which was briefly as follows: An Appeal was made against an assessment in respect of 1000*l.* stock or personal property charged upon the appellant, under a private act of Parliament, made in the 16th year of the reign of Queen Ann, for the maintenance of the poor of Norwich, whereby the churchwardens and overseers of the poor were authorized to assess “the inhabitants, and every “parson and vicar, and all occupiers of lands, “houses, tenements, tithes, and all persons hav- “ing and using stocks and personal estates, in “the parish of St. John Maddermarket, or hav- “ing money out at interest, in equal propor- “tions.” It appeared that it had been the cus- tom to rate the parishioners for *money out at interest*, as well without, as within, the said city, and it also appeared that the appellant

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\* 4 Term R. 771.

had not any stock or personal estate in the parish, nor any *money out at interest* in real or personal security, except only a sum of *money then vested in the 5l. per cent. consolidated bank annuities* :—the Session allowed the Appeal, and on a motion to quash this order of Session, the same was affirmed. For by the Court, “ This is not a local and visible property, within the parish ; and nothing is rateable to the poor under 43 Eliz. c. 2. which is not literally rateable ; and this private statute of Ann, being made in *pari materia*, ought to receive a similar construction. The words, “ *having money out at interest*,” must mean not indeed the possession of the money, because it is stated to be *out*, but having a right, at some time or other, at a period longer or shorter, to reclaim the money, which is so outstanding ;—by no means a description of money in the public funds, with respect to which, the parties have not the money out at interest, but in lieu thereof have an annuity.”\*

And, as stock in trade, when its value can be ascertained, is rateable to the poor ; if on an Appeal against a rate, because certain persons are not rated for their stock in trade, the Session make an order, subject to the opinion of the Court of King’s Bench, they must ex-

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\* 6 East’s R. 182.

pressly state, whether the property alleged to be in the possession of the parties untrated, belong to them, or not : and if it does, whether it produces a profit or not : or whether it be liable, or not, to incumbrances of equal value. If the Session omit this, the Court can not give any opinion!\*

In a recent case, *Trin. Term*, 47 Geo. 3, the owners of packet boats, employed under a personal contract with the post-master, in carrying the mails, &c., between Holyhead and Dublin, were determined to be liable in respect of the profits accruing to them, from the carriage of passengers, and luggage, in such boats, to be rated for the relief of the poor for the parish of Holyhead, where *such owners reside*.—The case was as follows:

Defendants appealed to Sessions against a rate made for relief of the poor of Holyhead, by which it appeared that one "Captain Jones" was rated for his "Packet" at 250*l.* 6*s.* and three other defendants, captains of packets, were respectively rated each *for his packet* in the same sum. That the appellants have all their houses at Holyhead, where their families at present reside, in respect of which houses they have been, and are, assessed to the poor rate ; each packet boat costs between 2000*l.* and 3000*l.* respectively, and the com-

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\* 6 Term R. 53.

manders thereof are at liberty to dispose of them. The packets are registered in the port of Beaumaris; when hailed at sea, and asked where the packet belongs to, the answer is, "Holyhead." The Appellants are respectively commissioned by the post-masters general, by an instrument under their hands, and under the common seal of the general post office. The packet boats are employed in the service of government to carry the mail, &c. between Holyhead and Dublin; for which the commanders receive annual salaries. By permission of the post-masters general, the appellants carry passengers, with their horses, luggage &c. They make annual profits which are of a fluctuating nature, but the average is not less than 250*l.* at which they are rated. They pay no Custom-House dues, fees, port charges, lights, &c. The appellants are responsible to the post-masters general. The Session confirmed the rate, subject however to the opinion of the Court of B. R.—Lord Ellenborough, Ch. J. said, "It is objected that they are not permanently *local* property in the parish of Holyhead, and that no profit is made of them there. But the inchoate act, which is to earn the profit begins there, and therefore there is a part performance within the parish, of that which is to make the profit, by the use of the property in question.—The boats are laid up there; they are re-

paired there; the owner dwells there; they yield profit there; for the passage money of the voyage from Dublin is actually earned there: and that of the voyage from Holyhead to Dublin, is at least begun to be earned in the parish of Holyhead. But whatever the question might be, as between Dublin and Holyhead, in this respect, it could only go to the *quantum*, with which we have no concern in this case; it is enough that this is, what it is contended it ought to be, *local* visible property in the parish; that it yields some profit it cannot be doubted, and the owner resides in the same parish.”\*

*Tolls of a ferry rated between two local stations, in neither of which the owner is resident.* In a case of *Rex v. Nicholson*, *East. T. 50 Geo. 3.* one John Nicholson had appealed against a rate made for the parish of Monk-Wearmouth in Durham, on the tolls of an ancient ferry, of which he was Lessee, between Monk-Wearmouth and Sunderland, but in neither of which places he was resident. The judgment pronounced by Lord Ellenborough, Ch. J. sufficiently indicates the points of the case, and illustrates the doctrine contended for. It was in substance, as follows, “The rate is here imposed on the *tolls merely*.—Tolls do not by themselves come under any of the descriptions of occupancy in the statute, If therefore the present proprietor be rateable at all, it must be as an *inhabitant*. But to

support a rate of *personal* property, *actual residence* has always been considered to be necessary to constitute inhabitancy. In all cases where tolls have been held liable to be rated, they have been arising out of the use of a canal, or other local and visible property, part of the land itself; but there is no case where tolls have been held liable *per se*; and if even liable as personal property, they could not be rated upon the present Appellant who is not an inhabitant."\*.

"On the subject of *pure locality*, unmixed with any other consideration, (in order to ascertain the place or places of rating, where several appear to be in some degree contributory to the subject of the profit, on which the rate, if any, must be founded) the following may suffice.

Rex. v. New River Company. *East. Ter.*  
53 Geo. 3. Appeal against a rate on the said Company of 15*l. per ann.* in the parish of Anwell for *land covered with water* in said Parish in their occupation, the springs of which supplied the new river *in a great degree*, and the value of which land so covered was estimated at 300*l.* No profit was made of this water till it arrived in London, and the question was, therefore, whether it were wholly in Anwell, or partly there, and partly in London, or wholly

in the latter place where the whole profit was made. The Court were clearly of opinion, that, on the face of the rate itself, *the land* appeared the immediate object of the rating ; and it was said by Bailey, J. " that the case being so, it was no matter whether the subject of profit (the water issuing out of the land) were conveyed in pipes to London, or carried by carts ; that the mistake had been by likening the case to that of tolls, and supposing therefore that the Company were liable to be rated for the whole profits *where* the produce was received."

But in another case, where the Corporation of Bath were in possession of *certain reservoirs for water* under an act of Parliament, situated in Lyncomb, and conveyed through *several other* parishes to Bath where the profit was made, and Lyncomb had rated them for the *whole of their profits* in that parish ; the Court of B. R. quashed the rate, observing, " that though the *reservoirs* are within the legal description of *land*, and of course rateable, where locally situated, *the profit* upon the water distributed at Bath could not be wholly rateable at Lyncomb, but, in some proportion or other, in parishes contributing to that profit."\*

Before the subject of Appeals against rates be finally concluded, it is necessary to observe

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\* 14 East's R. 609.

that, where an Appellant alleges that he has no rateable property within the place, the Respondents should begin, by shewing that he has *some* property liable to be rated, for otherwise it would be obliging the Appellant, in the first instance, to prove the negative. But if the Appellant only object to the *quantum* of rate, he admits his liability generally, and the *onus* of proof to support his Appeal lies on *him*, and he ought to begin.\*

It may save the young Practitioner some trouble of reference, if the few observations upon the evidence, which, in an especial manner, applies to appeals, be briefly recapitulated here, and which are as follow :

In all cases, where an original paper is lost, or destroyed, and reasonable evidence of such loss, or destruction, be adduced, a copy, or even parol testimony of its existence, is admissible : This rule particularly applies to, and is frequently called into exercise respecting, indentures of apprenticeship, and orders of removal.†

Although it be a general objection against a witness, that he has an interest in the question to be decided, it is enacted by statute‡ that, “ where pecuniary penalties, or any part thereof,

\* 4. Term R. 475.—1 Batt. 290.

† 6 Term R. 556.

‡ 27 Geo. 3. c. 29.

are given to the Poor, an inhabitant of any place shall be a competent witness to prove any offence, though the place of which he is an inhabitant may be benefitted by the conviction of the offender, if the penalty do not exceed 20l."

All persons not actually *rated*, although rateable, are good witnesses on appeals against Poor-rates: The rule respecting the disability of witnesses applying to their actual present interest in the case before the court, not to their *possible*, or *contingent*, or *future* interest.\*

For any more particular observations on evidence generally, or more minute discrimination respecting persons who, are, or are not, *compellable* to give their testimony on questions of parochial controversy, the reader must be referred to the previous pages, where the subject of *évidence* generally, is considered in a more extended form.

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**Judgment.**

What has gone before, respecting the *judgment* of the Court, related only to the *sentence* passed upon offenders. We come now to speak of the Judgment of the Court of Quarter Session on Appeals. The authority of the Court on this subject, it has been seen, arises imme-

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\* 4 Term R. 17.—2 East's R. 559.

diately out of the Appeal, and has no other foundation; wherefore they can make no original order of removal, but are confined to the two alternatives of quashing, or confirming, *an order previously made* by two Justices; and this rule, is uniform and universal, in its application.\*

And whatever judgment the Justices give, must be the act of the Court itself, and not by any delegation of its authority.† Even the few instances which may be produced as exceptions to this rule, on examination will be found not to operate as such, but in effect to confirm it. Thus, where the Justices in Session appointed a Committee from their own body to institute an enquiry, and make an examination, relative to the propriety of repairing, or rebuilding, a bridge, which had become a nuisance, the Court of B. R. were clearly of opinion that they were right in so doing, in order to receive their report and information relative to facts; for after all, the judgment was of course the judgment of the Session, however such Session might adopt the opinion of the individual Justices who had made their report.‡

The same may be said respecting the common practice of referring the actual amount of

\* Burr. S. C. 279.—1 Sess. Ca. 280.

† 16 Vin. 415.

‡ 5 Term R. 279.

General reference by consent.

costs incurred, to be ascertained by the Clerk of the Peace ; for the award of costs themselves is the judgment of the Court, and the *quantum* is a mere investigation of items ancillary to that judgment. But the Court cannot award Costs, *to be taxed afterward* by the Clerk of the Peace, for that would be in truth to delegate their power of final judgment over the amount of the costs to the officer of their Court.\* So where *by consent of Parties* the consideration of an appeal against a poor rate be referred to certain Justices out of Session, and the Justices in Session afterward adopt the opinion of the other Justices, and give judgment accordingly, this is not a delegation of the authority of the Court, but a previous adjustment *by consent of the subject, to be determined finally by the Court.*†

Discharge of Insolvent Debtors.

The **DISCHARGE OF INSOLVENT DEBTORS** has frequently been the concluding business of the Court of Quarter Session. Sufficiently to epitomise statutes so voluminous, as those which refer to this subject, in order to adapt them to an elementary practical treatise, would be a task nearly as difficult, as it would be

\* 9 East's R. 15.—13 East's R. 57.

† Cald. Ca. 30.

unprofitable, since the institution of a special tribunal for the cognizance of Insolvent Debtors by stat. 53 Geo. 3, c. 102. Suffice it therefore to refer the Reader to other authorities, where all the statutes on the subject are presented in a connected series.\*

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\* See Pract. Expos. *Title, Gaol*, sect. 5.

## CHAP. IV.

## THE TERMINATION OF THE SESSIONS,

*Herein of the duration of its authority, and its termination ; with some observations on other matters connected with, or arising out of, its duties ; not only while the Court is sitting, but subsequent to its adjournment, or expiration.*

**Termination** **ALL** Sessions are of course terminated by the departure of the Justices, the Constituted authorities by whom they are holden, unless they be previously prolonged by adjournment. But such adjournment ought not to be beyond the time of meeting of the next Quarterly Session.

**Adjourn-  
ment.**  
Cannot be  
to a day sub-  
sequent to  
the next  
Session by  
statute.

An indictment was found before the Justices for the County of Lincoln against a Constable for refusing to obey an order. The defendant was tried, convicted, and had judgment given against him at a *General Session* holden the 3rd day of May, (which was after the Easter Session began) by the adjournment of the Epiphany Session. The judgment was reversed by the Court of B. R. "because the Justices

cannot continue one General Session to a day subsequent to the time appointed by the stat. of Hen. 5, for the holding another original Session.”\*

But though they may not adjourn a matter *over* the next original Session, they may, in certain cases, adjourn it *to* them; as where a statute giving an appeal to the Session within a certain number of months after the cause of complaint shall arise, direct the Justices at the *said* Session to hear and determine the matters of such appeal, &c.; yet it seems they have an incidental power of adjourning it to another Session upon lawful cause;—of the sufficiency of which cause they are the sole Judges. But where the Session is adjourned, the style of it must not run “at such Session held by adjournment,” but the original meeting of the Session ought to be set forth, and that it was “continued from thence to such further time by adjournment.”†

It has been observed in a preceding page, Judgments that the whole Session being considered as one <sup>may be altered,</sup> day, the Justices may alter their judgments at any time before its expiration, and may therefore make any order to annul a former order made during its continuance; but this is a power to be exercised with great delicacy and

\* 19 Viner, 358.

† 2 Str. 832, 865.

discretion ; for if it were to be done by a fresh accession of Justices in the spirit of party, or otherwise in an unbecoming manner, it would be visited by the Court of B. R. in the shape of an information against the Justices who concurred in the transaction.\*

*Cannot be reviewed by a subsequent Session.*

It follows necessarily, from what has been already advanced, that, as the power of the Court expires with the conclusion of its sitting, if a question be not kept open by adjournment of the Session, or respite of the particular subject, it cannot be reviewed, or placed in any new situation, by any subsequent Session.†

*May be referred to a superior authority.*

But beside these means, by which the Justices may, purely of their own authority, procrastinate their decision on some subjects, there are other modes, by means of which any particular question of legal difficulty may be referred to the opinion of a superior tribunal ; or by which the subject matter may be altogether taken out of their hands, at the instance of a party interested.

These are 1st, by the reference of the whole case, or any particular point, to the Judge of Assize.

2ndly, By stating the special circumstances of a case for the consideration of the Court of King's Bench, and,

\* 2 Nol. P. L. 449.

† 2 Salk. 477.—2 Nolan, 450.

City, By a writ of *Certiorari*. Of these respectively.

A reference to the Judge of Assize, either of Reference to Judge of the whole case, or of some point of legal difficulty involved in it, used formerly to be a common practice, but is of late fallen much into disuse. For this change many reasons might be adduced, but they are unnecessary here. If any particular circumstances should make this mode eligible, the right still continues; but it has generally given place to a more eligible one, which is that of stating a special case for the determination of the Court of King's Bench.

This is carried into effect by the Counsel agreeing to a statement of facts, which are usually corrected and settled by a reference to the Chairman's notes.

The case so settled is to be signed by the junior counsel on each side. If no counsel are employed, or if they cannot agree upon a case, even with the assistance of the chairman, the latter may, with the concurrence of a majority of the Justices on the Bench, state and sign a special case himself.

There is no specific form or precedent, according to which a special case must be drawn; but nevertheless, there are certain rules to be

collected from a long succession of determinations, which are, in substance, as follow: The Justices, by the summary jurisdiction which is given to them, are placed in the situation of jurors, and judges, conjointly. They are to elicit the facts from the evidence as jurors would do, and they are to judge of the law arising out of those facts in the common course, if they think fit. Out of this position arise two conclusions; viz. first, that they are not *compellable* to grant a special case, if they entertain no doubt whatever of the law; and therefore, though it is certainly, in point of candor, right to comply with the request of either of the litigant parties by doing so, where any reasonable doubt on the subject is suggested, they will best consult the interests of the public by refusing it where they believe the application to arise out of mere obstinacy, or a spirit of litigation. Secondly, that their authority to judge of the *Law*, is the only one which they reserve for the Superior Court,

*The facts.* whence it follows that the *Facts* make no part of the subject matter, on which the Court above are to exercise their discretion, and therefore, having been found by the Justices, *they* must be specifically stated in the case, and not the *evidence* from which they were deduced.\* A very few examples may suffice for illustra-

tion. On an appeal respecting a pauper's settlement, where the question depends on an equivocal hiring, or a doubtful service for a year; the fact is to be deduced from the evidence, such as it may be, one way or the other, by the Justices, and not the evidence, from which they draw their conclusion, stated.\* So, whether a master gave a particular consent to his apprentice to serve a third person, is a matter of fact, which, let it rest on testimony ever so ambiguous, must be found, and not left doubtful on the face of the statement.† So in a question of settlement by residing on an estate, the Session must state the interest which the pauper took, whether he came in by descent, or by purchase; and if the latter, the price of such purchase;‡ that it may appear on the face of the statement, that it was such a purchase as will confer a settlement.

FRAUD is a fact. This, therefore, like all other matters of fact, if it make any part of Fraud is a the case, to influence the opinion of the Justices, must be specifically found by them, and stated accordingly; for it is not enough to state such evidence, though clearly leading to the most palpable conclusion of fraud, for the Court above to draw such conclusion.§ Cases

\* Burr. S. C. 682.

† 1 East's R. 73.

‡ 1 Term R. 241.

§ 1 Term R. 458.—7 Term R. 106.

have happened where both the conclusion of fact drawn by the Session, and the circumstances from which the inferences were deduced, have *both* been stated. Such a practice leads to this inconvenience, viz. that it leaves the question open for the Court above to draw a different conclusion from that which the Justices in Session drew, and *that* without the same means of appreciating the credibility of testimony.\*

**Certiorari.** Having seen the methods, by means of which the Justices in Session may voluntarily refer points of difficulty to be decided by a superior authority, we come lastly to the compulsory process of *Certiorari*, by means of which the Parties interested may, under certain defined restrictions, remove subjects cognizable by all inferior jurisdictions into the Superior Courts at Westminster. The removal of such, from the Courts of Quarter Session, into that of the King's Bench, is all, with which we have any concern here. This writ may be obtained at **Reasons** for any time before trial to certify and remove the proceedings, and it is usually done for one of the four following purposes. 1st, To consider, and determine the validity of *appeals*, or *indictments*, and the proceedings thereon ; and

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\* Burr. S. C. 57,—171.

to quash, or confirm, them as there may be cause. 2ndly, Where it is surmised that a partial or insufficient trial will probably be had in the Court below. 3rdly, In order to plead the King's pardon. 4thly, To issue process of outlawry against an offender, in those cases where the process of the inferior Court will not reach him.\*

Such writ of *Certiorari*, when issued and delivered to the inferior Court for removing any record or other proceeding, as well upon <sup>Supersedes</sup> all the proceedings in the inferior Court. indictments, as otherwise, supersedes the jurisdiction of such inferior Court; and makes all subsequent proceedings entirely erroneous and illegal; unless the Court of King's Bench remand the record to the Court below, to be there tried and determined. It may be granted, generally speaking, either at the instance of the prosecutor, or defendant; the former as a matter of right, the latter as a matter of discretion; and therefore it is seldom granted to remove indictments from the Justices of Gaol Delivery; or after issue joined, or confession of the fact in any inferior Court.† The effect if it is to remove all the proceedings described in it, and the Justices are bound to obey, on the production of it to them when sitting in their judicial capacity, and that, although it should have

\* 4 Black. Com. 321.

† 2 Hawk. 287.—4 Burr. R. 749.

been issued irregularly and improperly.\* But if it be for the removal of an indictment before the Justices in Session, and be not delivered till after the jury have been sworn for the trial of it, the Justices may proceed on it, and may set a fine to complete their judgment.†

Removes  
proceedings  
of individu-  
als as well  
as of courts.

This writ may be granted to remove convictions from individual magistrates, as well as proceedings from the Court of Session. If the Justice to whom it is directed, die with the recognizance, verdict, or conviction, in his possession, the writ may go to his executor, who must return the record.

Having given this general description of this writ, it remains to be noticed more particularly, *when* and *how*, it is to be obtained, and the forms observed in the return.

When grant-  
able.

It is a general rule that the King has a right in every case in which the crown is a party, to demand a *Certiorari*, and the Court are bound to grant it.‡ And even though an act of Parliament take away the *Certiorari* in express words, the crown is an exception, and shall not be construed to be included in the general restriction, unless there be words in the statute which shew a specific intention in the legislature that it should be so.

\* Crom. 129.

† 2 Ld. Raym. 1615.

‡ 2 Term R. 89.

The Court of B. R. will not grant this writ for the removal of a conviction before Justices of the Peace, unless the party applying for it shew some probable ground that injustice has been done below ; in which case it will be granted.\* Nor, generally speaking, for any indictments for offences, the heinousness or frequency of which, require all possible discouragement, unless a very strong ground be laid for it, as on an affidavit that a fair trial cannot be had below.†

A poor *rate* cannot be removed by *Certiorari*, on account of the inconvenience that would ensue to the poor by the delay ; but all the orders of Justices relating to it may be removed.‡

A rule has obtained in B. R. not to grant a *Certiorari* to remove *orders of Justices* from which appeals lie to the Sessions, before <sup>Not granted so as to prevent an appeal.</sup> the matter be determined on such appeals because it would take away that privilege ;— but if the time for appealing be expired, the objection no longer exists.§ And this rule only extends to abridge the authority of the Court in cases where the right of appeal is limited to a particular time, as to the *next* Quarter Session ; but where there is no restric-

\* 5 Term R. 252.

† 2 Ld. Raym. 1452.

‡ 2 Term. R. 355.—Doug. R. 116.

§ Salk. 147.

tion as to time, the rule does not apply, for otherwise the order could never be removed.\*

It has also been determined that where, by the words of any act of Parliament, the *Certiorari* is taken away, but by its general tenor, that is only done to give the option of appeal to the Sessions, the right of proceeding by *Certiorari* is only barred by the party adopting the method of appeal.†

And if one party have the exclusive right of appealing, he may waive his privilege, and remove the proceedings at once into the Court of B. R.‡

A *Certiorari* does not lie to remove any but judicial acts, and even though the Justices should exceed their authority, and be punishable for so doing, the remedy is not by means of this writ.§ And if such a writ issue incautiously or improvidently, the Court of B. R. will supersede it.||

How grant-  
ed.

During term-time, the writ of *Certiorari* is granted by the Court upon motion of counsel,¶ but in vacation a *fiat* for a *Certiorari* may be obtained from any of the Judges of the Court of B. R.\*\* who may grant or reject the

\* Cald. Ca. 172.

† 2 Term R. 89.

‡ 2 Nol. P. L. 489.

§ Cald. Ca. 309. 339.

|| 1 Burr. R. 488.

¶ 4 Wm. 3, c. 11.—8 & 9 Wm. 3, c. 32.

\*\* Burr. S. C. 157.

application according to their discretion regulated by the circumstances of each case, and the rules before laid down.

An early statute, after reciting that "in Statutes Indictments of riot, forcible entry, or assault and battery, found at the Quarter Sessions, are often removed by *Certiorari*," ENACTS, "that all such writs of *Certiorari* shall be delivered at some Quarter Session in open Court, and the parties indicted shall, before allowance of such *Certiorari*, become bound unto the prosecutors in 10*l.* in such sumties as the Justices at their Sessions shall think fit, with condition to pay to the prosecutors, within one month after conviction, such costs and damages as the Justices shall allow; and, in default thereof, it shall be lawful for the Justices to proceed to trial."

This statute did not extend to all indictments Statute does not extend to Sessions in general, but only to those particular ones therein mentioned.

By two subsequent statutes, therefore, it was provided that "all the parties indicted at the General, or Quarter, Sessions of the Peace, prosecuting a *Certiorari*, before the allowance thereof, shall find two sufficient maincaptors, who shall enter into a recognizance in the sum of 20*l.* before one or more Justices of the

\* 11 Jac. I, c. 8.  
11 & 12 Wm. III, c. 8 & 2 Wm. 2, c. 2.

Peace of the county or place, or else before one of the Judges of the Court of King's Bench; (in which case such Judge shall make mention of it under his hand, on the back of the writ.) And also that the recognizance shall be with condition, at the return of such writ, to appear and plead to the indictment or presentment in the Court of King's Bench, and at his own costs to procure the issue that shall be joined upon the said indictment or presentment, or any plea relating thereto, to be tried at the next assizes for the county wherein the indictment was found, after such *Certiorari* shall be returnable, if not, in London, Westminster, or Middlesex; and if there, then to cause it to be tried the next term after that wherein such *Certiorari* shall be granted, or at the sittings after the said term, if the Court of King's Bench shall not appoint any other time for the trial thereof; and if any other time shall be appointed by the Court, then at such other time, and to give due notice of such trial to the prosecutor, or his clerk in Court, and also that the party prosecuting such *Certiorari* shall appear from day to day in the said Court of King's Bench, and not depart until he shall be discharged by the said Court."

" And such recognizances, *Certiorari's*, and indictments, shall be filed in the King's Bench, and the name of the prosecutor (if he be the

party grieved or injured, or some public officer,) indorsed on the back of the indictment; and if the person prosecuting such *Certiorari*, being the defendant, shall not, before allowance thereof, procure such manucaptors to be abound as aforesaid, the Justices of Peace may proceed to trial of the indictment, notwithstanding such *Certiorari*."

From the words, "*all the parties indicted*," it appears the purport of these statutes, that they shall extend only to *Certiorari's* procured by *persons indicted* (whence it follows, that those which are procured by the *prosecutor* of an indictment, remain as they were at common law,\*) and they only extend to indictments at the Quarter Sessions.†

And for the better preventing vexatious delays and expence, occasioned by the suing forth writs of *Certiorari* for the removal of convictions, judgments, orders, and other proceedings before Justices of the Peace, it is further enacted,‡ "That no writ of *Certiorari* shall be granted, issued forth, or allowed, to remove any conviction, judgment, order, or other proceedings had, or made, by any Justice of the Peace, or the General, or Quarter, Sessions, unless such *certiorari* be moved or

Convictions,  
orders, judgments,  
and other pro-  
ceedings.

b

\* 2 Hawk. c. 27.

† 3 Burr. R. 2462.

Limitation. applied for, *within six calendar months* next after such conviction, judgment, order, or other proceedings shall be had, or made, and unless it be duly proved upon oath, that the party suing forth the same hath given six days

Notice. notice thereof, in writing, to the Justice or Justices, or two of them (if so many there be) before whom such proceedings have been, to the end that such Justices, or the parties concerned therein, may shew cause, if they think fit, against the granting such *certiorari*."

It has been determined that the six days notice, required by this statute, must be given *before the rule to shew cause is applied for*, and if it appears upon the motion that such notice has not been given, the Court will not even grant the rule to shew cause.\*

Also, it has been determined, that this statute, which enumerates *convictions, judgments, orders*, and other *summary proceedings* before Justices, does not extend to *indictments*, and therefore that to remove them the prosecutor is not compelled to give the six days notice.†

By another statute of the same reign, "no *Certiorari* shall be allowed to remove any judgment, or order, unless the Party prosecuting it, before the allowance thereof, enter into re-

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\* 5 Term. R. 270.

† 1 East's R. 298.

‡ 5 Geo. 2. c. 19.

cegnizance, with sufficient sureties, before a Justice of the county or place, or before the Justices at Sessions, where such judgment or order shall have been made or granted, or before a Justice of the King's Bench in 50*l.*, with condition to prosecute the same, at his own costs and charges, with effect, without wilful delay, and to pay the Party, in whose favor the judgment or order was made, within a month after the same shall be confirmed, his full costs, to be taxed according to the course of the court. And if he shall not enter into such recognizance, or not perform the conditions, the Justices may proceed and make such further order in such manner, as if no *certiorari* had been granted."

It has been determined, on the construction of these words, that the recognizance entered into must be for an entire sum of 50*l.*, and that the Party and his sureties entering into recognizances for two twenty-five pounds is bad.

"No writ of *certiorari*, to remove any county rates (made in pursuance of the statute) or any orders or proceedings of the General, or Quarter, Sessions touching such rates, shall be granted, but upon a motion to be made in the first week of the next term, after the time for appealing from such rates and orders is expired; and, upon affidavit, or otherwise, that the me-

rits of the question upon such appeal, or orders, will, by such removal, come properly in the judgment of the said court; and no such writ of *Certiorari* shall be allowed, until sufficient security be given to the respective treasurers in the sum of 100*l.* to prosecute such writ of *Certiorari* with effect, and to pay the costs in case such rates or orders be confirmed; nor shall any such rates, orders, or proceedings be quashed for want of form only; and all charges attending such removal shall be defrayed out of that or, any subsequent rate.\*\*

*Recapitulation.*  
No.

It may be expedient, at the conclusion of this article, and by way of general summary, to repeat two observations; viz. that the Court of B. R. will not encourage  *vexatious* delay, by granting a *certiorari* to remove proceedings, where it appears clearly that the Justices have been right in what they have done; and also, that none but judicial acts of magistrates are removable by it. But these are only general rules, to which there are a few exceptions,—the principal of which are, where the Crown is a Party, and requires the issuing of the writ; where an order of Justices being defective, it becomes necessary to remove it, to give them an opportunity of reviewing the case, in order to make a valid one; and lastly, where an order having been made in favor of a Party,

*Exceptions.*

CERTIORARI.

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to enforce the execution of it, he is obliged to resort to this remedy. In all these cases the restrictions of six months for the application, as well as the notice to the Justices, are dispensed with.

The notice generally necessary to be delivered to the Justice, or Justices, or other persons, should be in some such form as the following.

To A. B. Esq. one of his Majesty's Justices of the Peace, in and for the \_\_\_\_\_  
(or as the case may be.)

Whereas you did on the \_\_\_\_\_ day of \_\_\_\_\_  
in the year of our Lord \_\_\_\_\_ take the examinations of \_\_\_\_\_ and \_\_\_\_\_ and upon such examinations as aforesaid, (or as the case may be) did issue your order, or did convict &c. (or as the case may be). And Whereas it appears that (here state the objections to the order, conviction, or other proceeding) and moreover that the said (order, conviction, or other proceeding) was irregular and illegal, wherefore the said \_\_\_\_\_ being resolved to seek a remedy for the great injury which he (or they) has (or have) received and sustained by means of the said (order or conviction, or other proceeding,) I do hereby, on behalf of the said \_\_\_\_\_ according to the form of the statute in that case made and provided, give you notice that his Majesty's Court of

King's Bench will, in six days from the time of your being served with this notice, or as soon after as Counsel can be heard, be moyed on the behalf of the said ————— for a writ of *Certiorari* to issue out of the said Court, and to be directed to (*the proper officer of the Quarter Sessions of the Peace, if it be a record of Session, or otherwise, to the Justice in whose possession it ought to be\**) for the removal of (*the removal of the record of &c. as the case may be*) into his Majesty's said Court of King's Bench. Dated, &c.

P. Q.

Attorney for the said —————

**The Return.** Especial care should be taken that the proceedings to be removed are correctly described in the writ; for if there be any variance between the *Certiorari* and the record to be removed, the Justices are not obliged to remove such record.†

The record itself, or the tenor of it, according to the directions of the writ on the circumstances of the case, must be returned; and *that* without any extraneous matter, or explanation.‡

\* 4 Hawk. c. 27.—1 Str. 470.—2 East's R. 244.

† Dalt. c. 195.—Burr. S. C. 112.

‡ Dalt. 195.—2 Salk. 492.

On non-compliance a rule issues for the return, and on disobedience an attachment.\*

And the return must always be on parchment, for a return on paper has been held to be irregular.†

The writ, if directed to the Session, is usually returned by the Chairman of the day; if to individual Magistrates, by those to whom it is directed. It should be under the seal of an inferior Court, if to any such directed; but if to any Court not having a common seal, under the seal of the person making the return.‡

A recognizance taken by a Justice of Peace ought to be certified by such Justice *only*, till it be made a record of Sessions; after which it shall be certified in the same manner as the other records of Sessions.§

And upon a *certiorari* to remove a conviction by a Justice of Peace, a return that the record is returned to Sessions, and that a copy is annexed to the writ, is sufficient, because Justices ought in all cases to return convictions to Sessions.||

The return to a *certiorari*, for the removal of an indictment, ought to have the clause,

\* 1 East's R. 208.

† Barnardist, 113.

‡ Cal. Ca. 297.—2 Hawk. c. 27.

§ Orl. Juc. 669.

|| 2 Term R. 286.

*"and also to hear and determine diverse felonies," &c. in the description of the Justices who make the return, wherever such clause is necessary in the caption of the indictment, as for riots, forcible entries, and the like.\**

**Practice.** The writ of *Certiorari* itself issues from the Crown-Office, and therefore its form is not necessary to be inserted here. The attorney for the Party applying for it, on receiving it, if it be directed to a Session respecting *an order*, carries it, together with the recognizance to prosecute, to the clerk of the peace, who draws up, on parchment, a record of the order, in conformity to the entries made in the Session's book. If the subject matter be a poor rate, as the rate itself cannot be removed, the entry of appeal must include the title of the rate, and the allowance by the Justices.

**Form of Return from a Session.** The return to a *certiorari* for removing *an indictment*, may be made in the following manner, on a distinct piece of parchment.

First, on the back of the writ, write the following words :

"The execution of this Writ appears in a certain schedule hereunto annexed."

————— } "Be it remembered, that at the  
to wit, } "General Quarter Session of the  
} "Peace of our Sovereign Lord the  
"King, held at —————, in and for the said

" county of ——, on Wednesday, in the first  
 " week after the close of Easter, that is to say,  
 " the —— day of ——, in the —— year  
 " of the reign of our sovereign Lord George  
 " the third, King of the united kingdom of  
 " Great Britain, &c. before A B, C D, E F,  
 " and others their fellows, Justices of our said  
 " Lord the King, assigned to keep the peace  
 " of our said lord the King, within the said  
 " county of ——, and also to hear and deter-  
 " mine diverse felonies, trespasses and other  
 " misdemeanors, in the said county committed,  
 " upon the oath of W J, B J, &c. [here insert  
 " the names of the jurors by whom the bill was  
 " found] good and lawful men of the county  
 " aforesaid, then and there sworn, and charged  
 " to enquire for our said lord the King, and the  
 " body of the said county, it is presented in  
 " manner and form, as appears in a certain  
 " indictment annexed to this schedule."

P. Q. Clerk of the Peace  
for the said county.

To this schedule annex the record of the  
indictment, and send all up together.

Form of a Return from a single Justice. From a single Justice.  
 ————— { " I, A. B. one of the Keepers  
 to wit. } " of the Peace and Justices of our  
 " Lord the King assigned to keep  
 " the Peace within the said —— and also

" to hear and determine diverse felonies, trespasses, and misdemeanors in the same committed, by virtue of this writ to me delivered, do under my seal return into his Majesty in his Court of King's Bench, the \_\_\_\_\_ of which mention is made in the same writ, together with all matters touching the same. In witness whereof, I the said A. B. have to these presents set my seal."

" Given at \_\_\_\_\_ in said county the \_\_\_\_\_ day of \_\_\_\_\_ in the \_\_\_\_\_ year of the reign of \_\_\_\_\_."

Where no particular form is directed by statute, it may reasonably be supposed some little difference of practice may prevail; but the substance of all returns to these writs may be collected from the foregoing.

Return to be forwarded to the Crown Office.

Whatever form however the return assume; if from the Session, the orders having been annexed to the writ, the clerk of the peace remits them to some person in London, with the approbation of the Party applying, to be delivered by him into the Crown Office.

Ulterior proceedings.

With the ulterior proceedings in the Court above, we can have little concern here. It will be sufficient, by way of general information, to notice, that after the return has been thus made, the first proceeding is a motion to file the order, after which the regular course

is pursued till the subject is argued by Counsel. If upon such argument there appear any thing defective in the return; the Court will make a rule that the case shall be sent back again, either generally to be re-stated, or for additional information on any particular point of it. This rule, together with the original record, is re-delivered to the clerk of the peace, for enquiry at the next Session, if belonging to the Sessions of the Peace; and the matter, if it be one of facts, must be enquired into *de novo*, as if nothing had passed on it before,\* but otherwise, if some mere informality arising with the Justices.†

Any attempt to compress within the compass of a section, in an elementary treatise, a general dissertation on the subject of Costs, would be idle; and a particular enumeration of instances respecting the allowance of them by statute, or otherwise, under all their different aspects, would be worse than idle; it would instead, because it could not be sufficiently comprehensive for universal application.

\* *See* *1 Bait. Ven. 205.*

† *Burr. S. C. 682.*

General  
rules re-  
pecting  
costs.

5. A few general rules, and those too with reference to cases of the most ordinary occurrence before Justices in Sessions, are all that can be practicable here.

Then, of Costs on the last treated

1st. { subject, the removal of proceedings by writ of Certiorari.

2ndly. On Criminal prosecutions.

3dly. On Appeals against Peerages.

4thly. { On Appeals against Orders of removal.

{ Costs of cure and maintenance;

5thly. { to be endorsed upon a suspension of an order of removal.

6thly. { Upon Appeals against Overseers' accounts.

These are all the instances relative to Costs, upon which it is necessary to enter here, leaving all others (which are not of ordinary occurrence) to be collected from the respective statutes which create offences, regulate modes of prosecution, or direct the consequences.

On removal  
by Certio-  
rari.

By the statute of 8 and 9 Will. 3. before mentioned, it is enacted, that "if the defendant prosecuting the writ of certiorari, be convicted of the offence for which he was indicted, then the Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party

grieved or injured, or be a justice, constable, or other civil officer, who prosecutes on account of any thing that concerned him *as officer*, to be taxed according to the course of the said court, who shall for the recovery thereof, within ten days after demand and refusal of payment, on oath, have attachment awarded, and the recognizance not to be discharged till the costs are paid."

On these words it has been determined,

1st. That to come within the description of "a party grieved," there must be some actual injury sustained.\*

2ndly. That "*as officer*" means in the actual execution of the duty of an office, and that he must be a prosecutor *bona fide ex officio*,† and not a mere voluntary Prosecutor, though in office.

By the 5 Geo. 2, before mentioned, "The Person entitled to costs shall be certified to the King's Bench, and there filed with the *certiorari*, and payment of order or judgment thereby removed; and if the said order or judgment shall be confirmed by the Court, the persons entitled to such costs, for the recovery thereof, within ten days after demand made of the person who ought to pay, upon oath made of such demand and refusal, shall have an attachment for contempt, and the

\* 11 Will. R. 139.

† 2 Term. R. 47.—5 Term R. 33.

recognition shall not be discharged; and  
*the costs shall be paid*, and the order, so con-  
firmed, complied with, and obeyed.”

**Costs on Informations.** “Where any complaint shall be made before

any Justice or Justices, and any warrant or  
summons shall issue in consequence thereof,  
it shall be lawful for any Justice, who shall  
have heard and determined the complaint, to  
award costs to be paid by either of the parties,  
as to him shall seem meet, to the party in-  
jured; and in case any person ordered by the  
Justice shall not forthwith pay, or give secu-  
rity for the same to the satisfaction of the Justice,  
the same shall be levied by distress. And  
if goods and chattels of such person cannot  
be found, the Justice shall commit him to the  
house of correction for the place where such  
person shall reside, to be kept to hard labour  
not exceeding one month, nor less than ten  
days, or until such sum, together with the  
expences attending the commitment, be first  
paid.”\*

“But upon the conviction of any person,  
upon any penal statute, where the penalty  
shall amount to, or exceed, 5*l.*, the said costs  
shall be deducted by the Justice, according  
to his discretion, out of the penalty, so that  
the deduction shall not exceed one fifth part

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\* For the forms of awarding costs and levying them, &c.  
See Pract. Expos. Title, Costs.

of the penalty; and the remainder of the penalty shall be paid to the person who would have been entitled to the whole, in case this act had not been made.

And the Justices in Session may lay down, Authority of or alter from time to time such rules, as to costs to be allowed to any person by virtue of this act, as to them shall seem just: which rules having received the approbation and signature of one of the judges of oyer and terminer, or general gaol delivery, at the assizes, for the county, shall be binding, and not otherwise; and no person shall be allowed any greater sum than according to such rules."

But in many instances where a statute creates an offence and gives a penalty exceeding 5*l.* it also gives costs.†

The Costs or expences of conveying any person charged with an offence before a Justice, to gaol, are directed, by an early statute, to be paid by the offender, if able.‡

18 Geo. 3. c. 19.

† Where a statute gives *double costs*, they are calculated thus: 1st, The common costs; and then half the common costs.

‡ *Double costs*, first, the common costs; secondly, half of these, and then half of the latter.—*Tidd on Costs*, 56.

‡ 3 Jas. c. 10.

But, as that is seldom the case, they are ordered, by a subsequent statute, to be borne by the respective counties, and to be paid by the treasurer on an order from a Justice.\*

**On prosecution by a Court if defendant convicted.** "The Court, before whom any person has been tried and convicted of any grand, or petit, larceny, or *other felony*, may, at the prayer of the prosecutor, and on consideration of his circumstances, order the treasurer of the county, &c. to pay such sum as they shall judge reasonable, not exceeding the expences he was put to in carrying on the prosecution, with a reasonable allowance for his time and trouble; and the clerk of assize, or of the peace, shall, forthwith, make out such order, and deliver the same to the prosecutor on paying 1s. and the treasurer shall pay the same on sight, &c."†

**On a trial.** "The court before whom any person has been tried and *convicted* of any grand, or petit, larceny, or *other felony*, and before whom any such person has been tried and *acquitted*, (in case it shall appear to the said Court that there was a reasonable ground of prosecution, and that the prosecutor had, *bona fide*, prosecuted,) may order the treasurer of the county, riding, &c. to pay to such prosecutor such sum as they shall think reasonable, not exceeding the expences

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\* 27 Geo. 2, c. 3.

† 25 Geo. 2, c. 36.

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COSTS.

he was, *bond fide*, put to, making also, if he shall appear to be in poor circumstances, a reasonable allowance for his trouble and loss of time, which order, the clerk of Assize, or clerk of the Peace, respectively, shall, forthwith, make out, and deliver to him, being paid for the same 1*s.* and no more, and the treasurer of the county, &c. on sight of the order, shall, forthwith, pay the same."

And the Justices may, from time to time, alter such rules and regulations concerning Justices may  
from time to  
time alter  
rules and re-  
gulations. any costs or charges, so to be allowed."\*

And the Justices of inferior districts, having Inferior ju-  
risdictions. jurisdiction to try *felons*, and raising their own rates, independent of the county, in which they are locally situate, may make such regulations respecting such districts.†

But the Justices cannot order the costs of a prosecution for a *misdemeanor* to be paid by No costs to  
be ordered  
by Justices  
in trials for  
misdeme-  
nors. the treasurer of a county, out of the county rates, under the authority of any statute. Those just adverted to, only authorise such order in cases of prosecution for *felony*; and the 12 Geo. 2, c. 29, by which the payments that had been previously ordered by many separate statutes (which were consolidated by the last mentioned stat.) respects only *county purposes*, properly so called.‡

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\* 18 Geo. 3, c. 19.

† 6 Term R. 237.

‡ 7 Term R. 377.

Otherwise, in trials for defending themselves on county business. But it has been decided, that where any duty is imposed on a county, and where Costs necessarily and incidentally arise in questioning the propriety of acts done to enforce that duty, The necessary charges respecting all things relating to the *subjects themselves*, for which the Justices, were empowered to order payment, must, of course, be borne from the same source\*.

*Costs on appeal against a poor rate.* It is enacted, by 17 Geo. 2, c. 38, "that, on appeals against poor-rates, the Court may award reasonable costs to either party." But the appeal must be actually entered and determined, to authorize them to give costs, for *that is made*, a condition precedent by the statute. One gave notice of his intention to appeal against a rate at the next Quarter Session, but on the day before the Session countermaned his notice. The parish moved for costs for the expence they had been put to, in preparing to support the rate, but the Court of Session thought they had no power to award them, as the appeal had never been tried ; and of this opinion was the Court of B. R. on the question being submitted to them †

*On appeal against order of removal.* But on appeals against orders of removal, it is enacted by 8 and 9 Wm. 3, c. 30, "that the Justices in Session, upon proof being made,

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\* 4 Term R. 591.

† 8 Term. R. 584.

before them, of notice having been given of any such appeal, by the proper officers, to the church-wardens or overseers of any parish or place (though they did not afterwards prosecute such appeal) shall, *at the same Session*, order to the party, in whose behalf such appeal shall be determined, or to whom such notice shall appear to have been given, such costs and charges in the law, as by the said Justices, in their discretion, shall be thought most reasonable and just; to be paid by the church-wardens, overseers, or any other persons, against whom such appeal shall be determined, or by the person that did give such notice: And if the person ordered to pay such costs, shall live out of the jurisdiction of such Court; any Justice where such person shall inhabit, shall, on request to him made, and a true copy of the order for the payment of such costs produced, and proved by some credible witness on oath, by his warrant, cause the same to be levied by distress, and if no such distress can be had, shall commit such person to the common gaol there to remain by the space of twenty days".

On the construction of this statute, it has been decided, first, that it is not compulsory upon the Justices to give costs, but they are to be judge whether any are to be allowed, or not. \* given.

But, secondly, that if the Session do not hear

Cannot give the appeal, but adjourn it to a subsequent Session, they cannot give costs on the mere adjournment. <sup>them on a</sup> without a hearing.\*

**Maintenance** The Justices are also empowered to allow further costs, under the denomination of *maintenance*, in certain cases, by a subsequent statute, in the event of their determination on the merits of the case being with the appellants, to such amount as shall appear to them to have been reasonably paid by the appellant parish for the relief of the pauper, between the time of removal and the determination of such appeal; to be recovered in like manner as the other costs.†

**Conditional allowance of maintenance** An order of removal of Justices, was quashed by the Session for informality, and they then, on the presumption that another valid one would be made, made a conditional allowance of Costs for maintenance from the time of the removal, on such valid order taking place. But this order, *as to costs*, was quashed by the Court of B. R. because the Justices in Session must either give, or not give, Costs, *at the time when they make their order.*‡

**Maintenance ascertained by others, and judged** The Court of Session, as has been observed in a previous section, cannot delegate their authority to any other person, but it is not

\* Burr. S. C. 205.

† 9 Geo. 1. c. 7.

‡ Burr. S. C. 194.

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unusual, after allowing reasonable maintenance given  
according to the Statute, to direct that the expenses which have been incurred in maintaining the pauper, shall be ascertained before the clerk of the peace, and reported by him to the Court.\*

“ As poor persons are often removed during the time of their sickness, to the great danger of their lives ;” it is, for remedy thereof, enacted, that, “ in case any poor person shall be brought before any Justice of the Peace, for the purpose of being removed from the place where he or she is inhabiting, by virtue of any order of removal, and it shall appear to the said Justices that such poor person is unable to travel, by reason of sickness or other infirmity, or that it would be dangerous for him or her so to do, the Justices making such order of removal are required and authorized to suspend the execution of the same, until they are satisfied that it may safely be executed, without danger to any person who is the subject thereof ;— which suspension of, and subsequent permission to execute, the same, shall be respectively indorsed on the said order of removal, and signed by such Justices.

And the charges proved on oath to have been incurred by such suspension of any order of removal, may, by the said Justices, be direct-

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\* Cald. Co. 30.

ed to be paid by the churchwardens and overseers of the parish or place to which such poor person is ordered to be removed, in case any removal shall take place, or in case of the death of such poor person before the execution of such order.

*On non-payment and no notice given of appeal to be levied by distress and sale.*

And if the church-wardens or overseers of the parish, township, or place, to which the order of removal shall be made, or any or either of them, shall, upon the removal, or death, of such poor person ordered to be removed, refuse or neglect to pay the said charges within three days after demand thereof, and shall not within the same time give notice of appeal, as is hereinafter mentioned, it shall be lawful for one Justice, by warrant under his hand and seal, to cause the money mentioned in such order to be levied by distress and sale of the goods and chattels of the person or persons so refusing or neglecting payment of the same, and also such costs attending the same, not exceeding forty shillings, as such Justice shall direct; and if the parish, township, or place, to which the removal is made, or was ordered to be made, before the death of such person as aforesaid, be without the jurisdiction of the Justice issuing the warrant, then such warrant shall be transmitted to any Justice having jurisdiction within such parish, township, or place, who upon receipt thereof is to indorse the same for execution.

But if the sum so ordered to be paid, *on* <sup>Where the</sup> account of such costs, exceed the sum of twenty <sup>sum exceed</sup> 20/-, an <sup>an ap-</sup> pounds, the party aggrieved may appeal to the <sup>peal to Ses-</sup> next General or Quarter Session, *as they may* <sup>sions where</sup> it may be *do against an order of removal*; and if the <sup>diminished.</sup> Session be of opinion that the sum so awarded be more than of right ought to have been directed to be paid, such court may strike out the sum contained in the said order, and insert the sum which, in their judgment, ought to be paid; and in every such case the said court shall direct that the said order so amended shall be carried into execution by the Justices, by whom it was originally made, or in case of the death of either of them, by such other Justices as the court shall direct.\*

Upon the words of which statute the following constructions have been put by the Court of B. R.

1st. That the expression "*in case any poor person shall be brought before any Justice*," means merely *judicially* brought, not *personally*, for he or she may be so ill as to render that dangerous or impossible.†

2ndly, That the indorsement on the warrant of distress directed to be made by the Justice, is a mere ministerial act, and the direction compulsory upon him.‡

\* 35 Geo. 3, c. 101.

† 9 East's R. 101.

‡ 1 East's R. 117.

3dly, That the clause respecting the appeal against the charges is to be thus understood. If the party aggrieved, and intending to appeal against the charges, give notice within the three days after demand, by such notice he prevents any distress being made; but if he do not give the notice within the three days, in order to prevent the inconvenience of a distress, he does not thereby lose his right of appeal afterwards, which is given to him on the same terms *as* for an appeal *against an order of removal*.\*

4thly, That, although, by the stat. of Will. 3, which gives the appeal against removals to the party *aggrieved*, there could be no grievance to the Parish to which the order of removal was made, till it was actually executed; yet, as by this statute of 35 Geo. 3, even tho' the pauper die during suspension, and before the order be executed, a grievance arises in consequence of the Costs, which it directs to be levied on the said Parish, it is *an actual grievance*, though growing out of a subsequent statute on the same subject matter, and therefore the right of appeal attaches, as arising upon the determination of the Justices respecting the settlement of the pauper.†

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\* 9 East's R. 97.

† 13 East's R. 51.

By the statute 49 Geo. 3, c. 129, reciting 35 Geo. 3, the statute 35 Geo. 3, c. 101, whereby it is recited, amongst other things enacted, "That in case any poor person should be brought before any justice or justices of the peace, for the purpose of being removed from the place where he or she was inhabiting or sojourning, by virtue of any order of removal, or of being passed by virtue of any vagrant pass, and it should appear to the said justice or justices that such poor person was unable to travel, by reason of sickness or other infirmity, or that it would be dangerous for him or her so to do, the justice or justices making such order of removal, or such vagrant pass, were required and authorized to suspend the execution of the same, until they are satisfied that it might safely be executed without danger to any person who was the subject thereof, and that the charges proved upon oath to have been incurred by such suspension of any order of removal, might by the said justices be directed to be paid by the church-wardens and overseers of the parish or place to which such poor person was ordered to be removed, in case any removal should take place, or in case of the death of such poor person before the execution of such order: and that by the same act it was further enacted, That in case of an appeal against any order for the payment of such charges, if the Court of Quarter Sessions should be of

opinion that the sum so awarded be more than of right ought to have been directed to be paid, such Court might, and was thereby directed to strike out the sum contained in the said order, and insert the sum which in the judgment of such Court ought to be paid; and that in every such case the Court of Quarter Sessions should direct that the said order, so amended, should be carried into execution by the said justices by whom the order was originally made, or either of them, or in case of the death of either of them, by such justice or justices as the Court should direct: And that whereas it was expedient, that the power of putting an end to the suspensions of any such order of removal or pass, and of executing the several or other authorities aforesaid, should not be confined to the order of the justice or justices making such order or pass:” It is enacted, “that from and after

order of re- the passing of this act, in all cases wherever removal, &c. shall be sus- the execution of any order of removal, or of pended, any any vagrant pass, shall be hereafter suspended, Justice for the place by virtue of the said recited act, it shall be law- may order the same to be executed, of the county or other jurisdiction, within &c.

which such removal or pass shall be made, to direct and order that the same shall be executed, and to direct the charges, to be in- incurred as aforesaid, to be paid, and to carry into execution any such amended orders.

aforesaid, as fully and effectually to all intents and purposes as the said respective powers and authorities can or may be executed by the said justices who shall make any such order of removal, or by the justice who shall grant any such pass as aforesaid."

When the execution of any such order of removal shall be suspended, the time of appealing against such order shall be computed according to the rules which govern other like cases, from the time of serving such order, and not from the time of making such removal under and by virtue of the same.

And it is also recited, "That in order to avoid any pretence for forcibly separating husband and wife, or other persons nearly connected with, or related to each other, and who were living together as one family at the time of any order of removal made, or vagrant pass granted, during the dangerous sickness or other infirmity of any one or more of such family, on whose account the execution of such order of removal or vagrant pass was suspended;" And enacted and declared, "That where any order of removal or vagrant pass shall be suspended, by virtue of this, or of the said recited act, on account of the dangerous sickness or other infirmity of any person or persons thereby directed to be removed or passed, the execution of such order of removal or vagrant pass shall also be suspended for the same period

Order of removal suspended in case of sickness, may be extended to other persons of the family.

with respect to every other person named therein, who was actually of the same household or family of such sick or infirm person or persons, at the time of such order of removal made or pass granted."

**Justice, when to take his examination and report it** And whenever it shall happen that any pauper is by age, illness, or infirmity unable to be brought up to a petty Session to be examined as to his or her settlement, it shall be lawful for any one Magistrate acting for the district where such pauper shall be, to take the examination of such pauper, and report the same to any other Magistrates acting for the said district, and for the said Magistrates upon such report, to adjudge the settlement of the said pauper, and make and suspend the order of removal as fully and effectually to all intents and purposes, as if the said pauper had appeared before the Magistrates.

**Settlement to be adjudged on such report.**

**Costs on appeals against overseer's accounts.** It has been observed before, that the stat. 43 Eliz. gives an appeal, indefinite in point of time, to the Quarter Sessions against overseers' accounts ; And, that the 17 Geo. 2, c. 38. gives a similar appeal, but confines it to the next Session, and accompanies it with an authority, to order costs to either party.

**Special Session to be holden to investigate the accounts.** And 50 Geo. 3, c. 49, which gives an additional security against the incorrect, or extravagant, accounts of church-wardens and overseers, by directing, that a special Session shall

be holden for investigating such accounts, and gives such church-wardens and overseers an appeal against any reductions or disallowances made by such Justices in special Session, to the *next General, or Quarter, Session* of the Peace, directs also, that the Justices in such General or Quarter Session of the Peace, shall, *if they think fit*, make an order that such church-wardens and overseers shall have the costs by them incurred, defrayed out of the poor rates of the Parish or Place.

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OUTLAWRY is a punishment inflicted on a <sup>What it is.</sup> person for a contempt and contumacy, in refusing to be amenable to, and abide by, the justice of that court, which hath lawful authority to call him before them ; and as this is a crime of the highest nature, being an act of rebellion against that state or community of which he is a member, so does it subject the party to diverse forfeitures and disabilities.

But the law distinguishes between Outlawries in capital cases, and in those of an inferior nature ; for an Outlawry in treason and felony is of itself an attainder, and subjects the party to such an award thereupon to be made by the court where he is brought, as is suitable.

Of different descriptions.

to the offence for which he is indicted and outlawed; for the law interprets the party's absence a sufficient evidence of his guilt, and without requiring further proof or satisfaction, accounts him guilty of the fact: on which ensues corruption of blood, and an absolute forfeiture of his whole estate real and personal, and many men who never were tried have been executed upon the Outlawry.\*

**Execution.** And if a man be indicted before Justices of the Peace, and thereupon outlawed, and be taken, and committed to prison, the Justices of gaol delivery may award execution of this prisoner, for they are constituted to deliver the gaol.†

**Names to be certified.** And by the statute 34 Hen. 8, c. 14, the clerks of the crown, clerks of assize, and clerks of the peace, are to certify into the King's Bench the names of all persons outlawed, attainted, or convicted; and upon letters from the Justices aforesaid, certificates shall be made of such persons to the Justices of gaol delivery.

**Effects of it.** or confession, it does not subject the party to any severer punishment, than the crime does for which the Outlawry was pronounced; and

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\* Co. Lit. 128.—4 Burr. R. 2549.

† 2 Hale's Hist. 35.

therefore, if it be in a crime, for which clergy is allowable, the party outlawed shall be allowed his clergy, in the same manner as he who is convicted by verdict or confession.\*

It is said by Blackstone, that any person may arrest an outlaw on a criminal prosecution, either of his own head, or by writ or warrant of *capias utlagatum*, in order to bring him to execution.†

It is clear that the Courts at Westminster may issue process of Outlawry, and that the Court of King's Bench, either upon an indictment originally taken there, or removed thither by *certiorari*, may issue process of *capias* and *exigent* into any county of England upon a *non est inventus* returned by the sheriff of the county where he is indicted, and a *testatum* that he is in some other county.

And also Justices of assize and terminer may issue a *capias* or *exigent* (and so proceed to the Outlawry of any person indicted before them), directed to the sheriff of the same county where they hold their session, at common law; and by the statute 5 Ed. 3, c. 11, they may issue process of *capias* and *exigent* to all the coun-

\* 2 Hawk. c. 33.

† 4 Black. Com. 320.

ties of England, against persons indicted or outlawed of felony before them.\*

But Justices of gaol delivery, it has been said, cannot regularly issue *capias* or *exigent*, because their commission is to deliver the gaol of the prisoners therein being, so that those whom they have to do with, are always intended in custody already.†

*Justices may proceed to Outlawry.* And Justices of the Peace in their Sessions may proceed to Outlawry, in cases of indictment found before them, and *that* by the common law; and also in cases of popular actions by the statute of 2 Jac. 1. c. 4. But it is said that they cannot issue a *capias utlagatum*, but must return the record of the Outlawry into the King's Bench, and there process of *utlagatum* shall issue.‡

Nevertheless, it has been holden by high authority, that, if one be outlawed before Justices of Peace upon an indictment of felony, they *may* award a *capias utlagatum*; for they that have power to award process of Outlawry, have also power to award a *capias utlagatum*, as incident to their authority and jurisdiction.§

*Exigent what.* The *exigent*, which is the immediate precursor of Outlawry, is a writ which lies in

\* 2 Hale's Hist. 198.

† Ibid.

‡ Dalt. c. 193.—2 Hale's Hist. 52.

§ 12 Co. 103.

*actions personal*, where the defendant's person cannot be found, nor goods within the county to be distrained: Also, in *indictments of treason, or felony*, where the party is not forthcoming, and on all indictments for trespass *vi et armis*, and all offences of a *higher* nature, but not on those of an *inferior* kind. It does not lie on any offence created by statute, unless specifically given, or *necessarily* to be inferred. This process lies also on *informations*, even though for offences, in which there is no actual force, as libels and the like; for the force is not the criterion, but the enormity of the offence.†

The writ is directed to the Sheriff to proclaim and call the defendant five County Court days, one immediately following the other, charging him to appear upon pain of Outlawry. If he come not at the last proclamation, he is said to be *quinqüies exactus*, and is then outlawed.

No person under 12 years of age can be <sup>Persons under 12 years of age.</sup> outlawed, because that was the earliest age at which they could be sworn to their allegiance in the Torn or Leet.

Outlawry in treason gives the forfeiture of <sup>Forfeiture.</sup> the lands to the King, but in felony to the lord of

\* 2 Hawk. c. 27.

† 4 Burr. R. 2557.

## OUTLAWRY.

whom they are immediatly holden. But the bare judgment, without the return thereof of record, ~~Proceedings~~ gives no escheat. But it must be returned by after the judgment in the Sheriff, with the writ of *exigere*: *Or*, it must be removed by *certiorari*; for the county Court not being a Court of record, the judgment given by the Coroner in it is not matter of record.\*

**Reversal.** All Outlawries may be reversed by the defendant coming in upon the *capias utlagatum* and pleading errors either of fact, or law. If it be in a criminal matter, he must plead in person; but in civil ones may do it by his Attorney.

**Rights restored.** After a reversal of Outlawry, the Party is restored to his former rights.†

And this is all that it is thought necessary to submit on this subject, the proceeding to Outlawry being out of the ordinary course of practice at Sessions, for which *various* reasons might be assigned, but for which *one* is sufficient; viz. that, for the generality of accusations preferred before that tribunal, the defendant is in the actual, or virtual, custody of the Court, previous to the indictment being presented.

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\* 2 Hale's Hist. 206.—1 Inst. 288.

† Co. Lit. 280.—2 Hawk. c. 30.

PARDON.

"The King," says a celebrated commentator on the English Laws, "is the proper person to prosecute all public offences and breaches of the Peace, being the Person injured in the eye of the Law. And hence arises also another branch of the Prerogative, that of pardoning offences; for it is reasonable that he only who is injured, should have the power of forgiving;"\*  
whence flowing.

And it seems to be a settled rule, that the Extent of King may pardon any offence whatsoever *after* the King's *it is committed*, whether it be against the common, or statute, law, so far as the public is concerned in it, and this either before the attainment, sentence, or conviction, or after.†

But it seems agreed, that the King cannot, by any previous licence, pardon, or dispensation, make an offence dispunishable, which is unlawful in itself, as being either against the law of nature, or so far against the public good, as to be indictable at common law; and that a grant of this kind, is plainly against reason and the common good, and therefore void.‡

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\* 1 Black. Com. 269.

† 2 Hawk. c. 37.

‡ Ibid.

It is also expressly enacted by statute, that "no dispensation by *non obstante* of, or to, any statute, or any part thereof, shall be allowed; but that the same shall be void and of none effect, except a dispensation be allowed in such statute."\*

And releasing recogni-  
saues.

If one be bound by recognizance to the King, to keep the peace against another by name, and generally to all other lieges of the King; in this case before the peace be broken, the King cannot pardon or release the recognizance, although it be made only to him, because it is for the benefit and safety of his subjects.†

And barring  
actions.

Neither can the King, by any charter whatsoever, bar any right of entry or action, or any legal interest or benefit, *actually vested* in the subject; and therefore it seems clear, that he cannot bar any action on a statute by the party grieved:—Nor even a popular action commenced *before his pardon*; for *after* an action popular is brought, the King can but discharge his own part, and cannot discharge the informer's part; because by bringing of an action, the informer has an interest therein.‡

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\* 1 Wm. & Mar. Sess. 2. c. 2.

† 3 Inst. 238.

‡ 2 Hawk. c. 37.

Yet, before the action is brought, the King may discharge the whole (unless it be provided to the contrary by the act), because the informer cannot bring an action or information originally for his part only, but must pursue the statute.\*

Neither can the King pardon, where private justice is principally concerned in the prosecution of offenders. And there are also, in some cases, even where the King is sole party, some things which he cannot pardon; such as common nuisances for not repairing highways, or the like: for although the prosecution for redress and reformation thereof is in such cases vested in the King only, to avoid multiplicity of suits; yet this offence itself savours more of the nature of a *private* injury to each individual in the neighbourhood, than of a public wrong; and therefore it is settled, that the King cannot pardon either the nuisance, or the suit for the same, because such pardon would take away the only means of compelling a redress of it.†

Thus much is all that has been thought necessary to be introduced on the constitutional right of the crown to grant pardons generally. On the other points of view, in which so prolific a subject may be considered, the only dif-

\* 3 Inst. 231.

† 4 Black. Com. 398.

ficulty is to condense it sufficiently for practical purposes. With this view, all observations respecting *general* Pardons, either by the Crown, or by act of Parliament; the contested right of pardoning by the Crown in case of *Parliamentary impeachment*; and the obsolete practice of obtaining pardon by approvement; are wholly omitted.\*

The only Pardons, then, with which we are concerned here, are divisible into two species:

1. Pardons of course, and of *Common right*.
2. Pardons of grace and favor.

A Pardon is grantable of common right—First, to persons found guilty of excusable homicide.—Secondly, to certain felons and other offenders who discover their accomplices. Thirdly, to persons to whom the King has by proclamation promised his pardon.

On the *first* of these divisions little may suffice, especially as it relates to an offence not commonly brought before Justices in Session.

By the stat. of Gloucester, 6 Ed, 1. c. 9, it is enacted, that “if it be found by the county, that a person tried for the death did it in his defence, or by misfortune, then by the report of the Justices to the King, the King shall take him to his grace, *if it please him.*”

Although, at first sight, it seems to be implied, that it is left to the discretion of the

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\* 4 Black. Com. 330.

PARDON.

King, whether he will grant a pardon in such a case, or not; yet it is settled, that the words *if it shall please the King*, are only out of reverence, and were not intended to make the right of the subject to such a pardon precarious: it has therefore been long determined, that, in such case, a Pardon is grantable of right.\*

And it is said, that upon removing the record by *certiorari*, he shall have a pardon and writ of restitution of his goods, as a matter of course and right, only paying for saving out the same.†

But to prevent this expence in cases where the death has notoriously happened by misadventure, or in self-defence, the judges will usually permit, if not direct, a general verdict of acquittal.‡

Secondly, Pardons to felons and others who <sup>Pardons to</sup> discover their accomplices, are generally provided by the several statutes which create the offences, as *mala prohibita*, or which regulate the mode of punishing the commission of such offences. This practice was first introduced in the reign of Wm. and Ma. in the case of robbery,§ and was soon followed in that of Anne.||

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\* 2 Hawk. c. 37.

† Ibid.

‡ 4 Black. Com. 188.

§ 4 & 5 Wm. & Mar. c. 8.

5 Ann. c. 21.

in burglary, house-breaking, horse-stealing, and shop-lifting. Most of the subsequent statutes, which have introduced new prohibitions, or have provided new remedies for existing offences, as, for fishing in private waters,\* destroying works on navigable rivers,† &c. have followed the example, but especially those respecting the coin, and the revenue.

These provisions, however, *generally* relate to persons who are at large,‡ and who, to entitle themselves to a Pardon, as matter of right, must not only give evidence against, but must actually be the means of convicting by their evidence, other offenders. For on this subject it has been holden, that if the confession of the accomplice be such as, on the trial, the jury give no credit to, or it be a partial confession, it gives him no *legal right* to a Pardon.§

**Accomplices** Before we quit this particular consideration compelled to give evidence and to receive a pardon. of “*pardon by statute* to accomplices,” it may be useful, at least, to notice, in a recent instance, the extraordinary extension of the principle introduced by the statutes we have averted to. By 39 and 40 Geo. 3, c. 106 for preventing combinations among workmen, in sect. 9, it

\* 5 Geo. 3, c. 14.

† 8 Geo. 2, c. 20.

‡ Not universally so, as frequently stated, for see 22 Geo. 3, c. 28, respecting felons under 15 years of age, discovering the receivers of stolen goods.

§ Cowp. R. 335.

PARDON.

is enacted, that " Every person offending, (i. e. *accomplice*) may equally with all other persons, *be compelled* to give evidence as witness on behalf of his Majesty, or the informer, upon any information to be made against any other person, &c. and in all such cases, every person having given his evidence as aforesaid, shall be indemnified."

Thirdly, as to the persons to whom the King Pardons by has, by proclamation, promised his pardon. It is clear, that all persons to whom the King has, by special proclamation in the gazette, or otherwise, promised his Pardon, and who come in under the royal faith and promise, have a right to a Pardon; so clear, that not a word need be offered on the subject; for if the King have the right of pardoning at-all, the pledge of his mercy, given in the authorised form of a proclamation, must be sufficient. The only doubt that can ever arise on the subject, is where persons apparently entitled by their office, to stipulate for a pardon, shall have been induced, by the obvious benefit of discovery, to exceed their authority; but the consideration of this occurrence comes more properly under the last division of our title, and which is the most important for the consideration of Justices in Session, viz.

Special Pardons of *Grace and Favor*.

Pardons of *Grace and Favour*, to individual Pardon of offenders, are placed in opposition to those of <sup>of</sup> *Grace and Favour*.

## PARDON.

part, of which we have been treating, and are those of most interest in the contemplation of Justices, because respecting *them* most is left to the magistrate's discretion; whether the question be considered with a view to the conviction of the principal participators in the offence, or to the pardon of those on whose testimony conviction may have been accomplished.

We will treat first of Pardons of grace and favour to individual accomplices, *in order to procure* the conviction of some principal participators in the offence.

Justices' authority to promise pardons.

Blackstone says, "It has been usual for the Justices of the Peace, by whom any persons charged with *felony* are committed to gaol, to admit some one of their accomplices to become a witness (or, as it is generally termed, King's evidence, against his fellows; upon an *implied confidence*, which the judges of gaol delivery have usually countenanced and adopted, that if such accomplice make a full and complete discovery of that, and of *all other felonies*, to which he is examined by the Magistrate, and afterward give his evidence, without prevarication or fraud, he shall not himself be prosecuted for that or any other previous offence of the same degree.\*

---

\* 4 Black. Com. 331.

This practice of admitting accomplices as witnesses for the prosecution, has been introduced in modern times, in

In substance, and in effect, the doctrine advanced by the learned commentator is correct; but it should appear not to be technically and precisely so *in law*, by what was laid down (as if in allusion to this very paragraph) with particular emphasis (on a trial which excited great interest, and was more than commonly agitated) by Lord Mansfield, C. J. in *Mid. Term*, 16, Geo. 3, on a case reserved from the Old-Bailey.\* “A Justice of Peace,” said he, “cannot pardon an offender, and tell him he shall be a witness against others; *he cannot select whom he pleases to pardon, or prosecute*; and the prosecutor has even a less pretence to select than the Justice of Peace.” However, although the Justices *deceive* the accomplice, under a *promise*, or *assurance*, or *hope*, of pardon from them, which, in strictness, they have no right to make; yet if he make a full and fair disclosure, at the time of his examination, of all he knows, he will be entitled to a *recommendation to mercy*, and the King’s Bench will in this case bail him, in order that he may apply for the King’s pardon; or the Justices of gaol delivery, on all <sup>Judges will</sup> <sub>defer trial of</sub> the circumstances relative to the prisoner’s <sub>accomplices</sub>

imitation of, but, in truth to get rid of, an ancient and inconvenient method for partially producing similar consequences, called *approvement* (for which the reader is referred to Black. Com. vol. 4, p. 330) and, in conformity with the source from which it is derived, only applies to felonies, or, in other words, to crimes of a higher nature than misdemeanors.

\* *Rex. v. Rudd. C.wp. R. 326.*

~~Under cer-~~ ~~tain circum-~~ claim of indemnity being laid before them, will exercise their discretion in *deferring the trial* accordingly.

~~The same~~ ~~by Justices.~~ And Justices in Sessions are in the continual habit of exercising a similar discretion, as to deferring the trial of accomplices, whom it may be convenient to admit as witnesses for the conviction of others.

Indeed, the objects in both cases being the same, a *general* similarity runs through all the proceedings respecting this subject, whether it come before Judges of Assize, or Justices in Session; and in both the previous recommendation of the examining Magistrates receive an equal degree of attention from the Court and the Crown.

~~Mode of ob-~~ ~~taining par-~~ The method of pardoning at the Assizes, and at the Old-Bailey, is this, A sign manual issues, signifying the King's intention of either an absolute or conditional pardon, and directing the Justices of Gaol delivery to bail the prisoner, in order to appear and plead the next general pardon that shall come out, which they do accordingly; taking his recognizance to perform the conditions of the pardon, if any:—For the King may extend his mercy on what terms he pleases, and, consequently, may annex to his pardon any condition that he thinks fit, whether precedent or subsequent, on the performance whereof, the validity of the pardon will depend.\*

---

\* 2 Hawk. c. 37.—1 Black. R. 479.

But if the party do not perform the condition of the pardon, the pardon becomes void, and he may be taken and executed on the first judgment. For the condition of the King's Pardon being gone, the party remains precisely in the same situation that he was the moment before the Pardon was granted, and being brought up to to the bar, he may be remanded to his former sentence.\*

It seems also to be laid down as a general rule, that wherever it may be reasonably intended, that the King, when he granted such Pardon, was not fully apprized both of the heinousness of the crime, and also how far the party stands convicted thereof upon record, the Pardon is void as being gained by imposition upon the King.†

In conformity with this, it is expressly enacted by 17 Ed. 3, c. 2, that "in every Pardon of felony, granted at any man's suggestion, the suggestion, and name of him that makes it, shall be comprised: and if it be found untrue, the charter shall be disallowed, and the Justices before whom the charter shall be alledged, shall inquire of the same suggestion, and if they find it untrue, shall disallow the charter."‡

If the accomplice, who is recommended by the examining Magistrate, as a witness to con-

Accomplices  
how admitted  
evidence.

\* Leach's C. L. 73, 220, 330.

† 2 Hawk. c. 37.

‡ 27 Edw. 3, c. 2.

strict the principal, be in custody in Court, he is, on the motion of Counsel, *instante* admitted, almost as a matter of course (from the confidence properly, if not necessarily, given to such recommendation, sanctioned by the approbation of the counsel, who, it is reasonably to be presumed, only consents to take upon himself such responsibility on the clearest conviction of its expediency.) If he be under recognizance only, to appear when called upon (which is most commonly the case on suspicion of such felonies as are usually tried before the Court of Quarter Session) on such motion being made to the Court, he is usually admitted in the same manner, though there be no such recommendation from the examining Justice.

**The mode of obtaining pardons on convictions at Sessions.** We come now, in the last place, to consider pardons of grace and favour to persons *convict-ed* of offences at Sessions, and which, like those obtained at the assizes, or at the Old Bailey, may be either absolute, or conditional. The mode of obtaining them is, indeed, in a *general view* of it, similar, before whatever Court the offender have been convicted; viz. by a recommendation of such court to the Crown; but there are considerable differences on *particular points* between the authority of Judges, and of

**Differences in the authority of Judges and Justices, respecting** Justices, which it is necessary to notice. If a Judge of Assize, or at the Old Bailey, have any doubt on a point of law, arising in the case of any prisoner, he can respite the execution of his sentence, and take the opinions of the

other Judges on the subject; after the obtaining of which, the prisoner has the chance of being liberated as having been convicted against law, or of being recommended to mercy, on the *whole circumstances* of his case\*.

Not so, the Justices in Session. If a prisoner be convicted before them, they have no means of obtaining the opinions of the Judges upon any point of law; it *is said* they cannot even respite their sentence, or the execution of it if passed, beyond the immediate Session itself, their authority terminating with the actual separation of the Justices composing the Bench; and lastly, they have no means of correcting themselves in any particular where it might be desireable, but by a process, at once tedious, expensive, and unauthoritative.†

In order, however, to meet these difficulties, in the best manner possible, if for *any* reason, either for the purpose of laying a case before counsel on a point of law, or for other cause, the Justices in Sessions find it convenient to respite sentence, or execution of it, the usual

Method of  
resisting  
sentence on  
convictions  
at Sessions.

\* Nash's case, O. B. 1813 and many others.

† These have been grievances long complained of; and the some alleviation of them may be suggested in the controlling power of the Court of King's Bench, to correct the errors of inferior Courts, it would be a matter of great convenience to Justices, as well as to poor prisoners, if some less expensive, and more summary, method were devised.

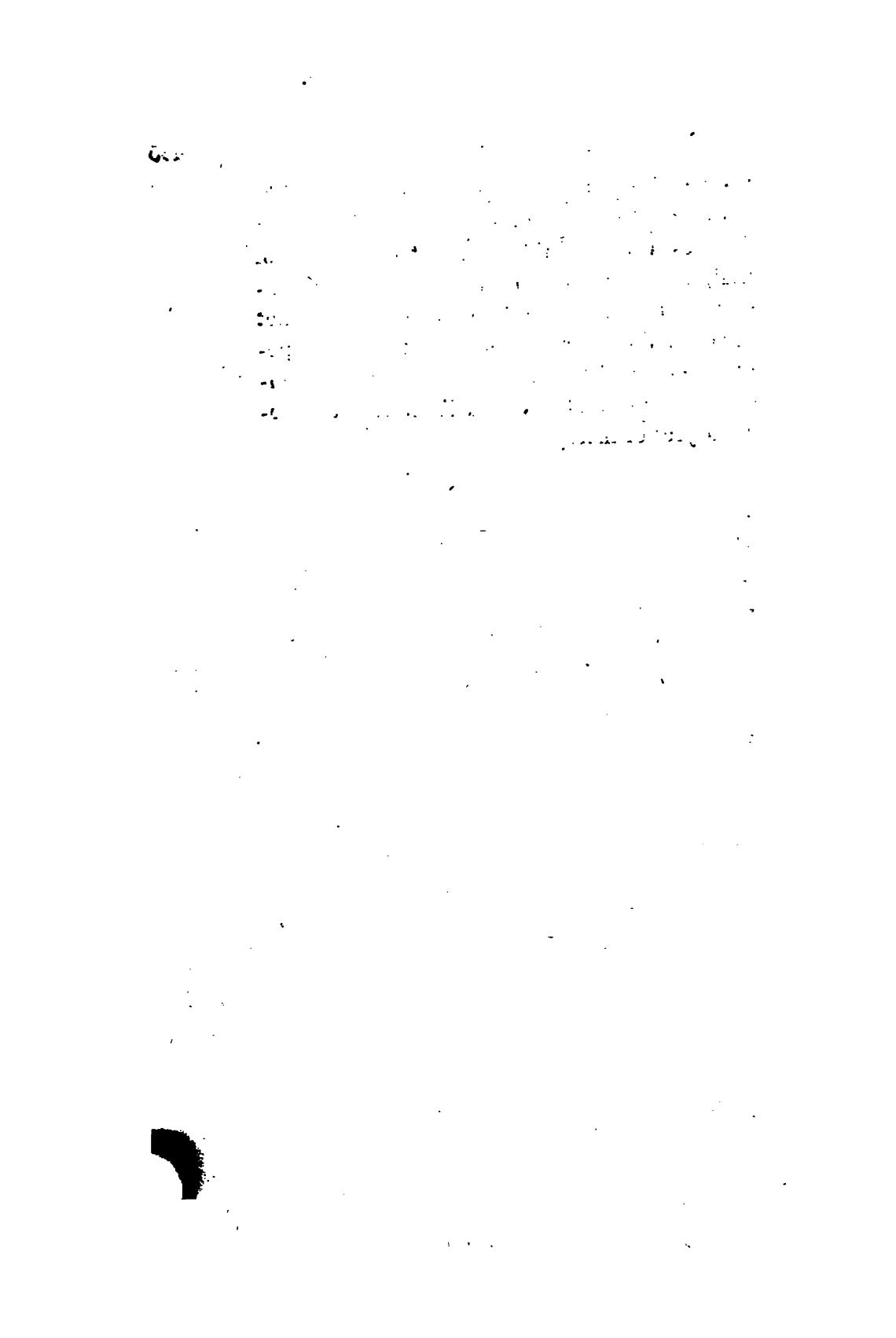
practice is to keep the Session alive by adjournment, till they have satisfied themselves.

It requires no great stretch of sagacity to discover great possible difficulties in, and some reasonable objections to, this mode of proceeding; but it has been considered as the best which has suggested itself, short of an application to the Crown, *after sentence*, for a Pardon.

Method of  
obtaining  
pardons on  
convictions  
at Sessions

If an offender, convicted before Justices in Session, mean to apply to the Crown for a pardon, either absolute or conditional, the mode is as follows. He procures a petition to be drawn, setting forth the nature of his offence; the sentence of the Court, the circumstances he means to insist upon as his claim to mercy, and concluding with a prayer to that effect. In order to render such petition successful, the chairman of the Session, before which he was convicted, must indorse on this petition, at least his approbation of its being presented, but he is at liberty to add his recommendation to mercy, in such terms as he conceives the prisoner to merit it. The petition, thus sanctioned, must then be transmitted by the clerk of the peace, or town clerk, as the case may require, to the Secretary of State for the Home Department. Generally speaking, pardon almost immediately follows an application made under these circumstances. If the petition be

presented by negligence or mistake, without the indorsement of the chairman, or other Justices present in Session at the time of trial, it is usual to refer it back for their consent. If such consent be withheld, it is not usual for the Secretary of State to lay the petition before his Majesty, the necessary conclusion being that the petitioner is not a proper object of mercy.



## APPENDIX.

Doubts having been entertained by some persons, whether the form of the oath, of modern introduction, which is now commonly administered to Constables, at Quarter Sessions, be sufficient; inasmuch as by the terms of it, they are only sworn generally to perform the duties of the office, without any specification what those duties are: It has, therefore, been thought right to introduce here the form of the Constable's Oath as it was formerly used, according to Dalton, distinguishing only such parts of it as have been superseded by modern statutes, or are become obsolete.

" You shall swear that you shall well and  
" truly serve our Sovereign Lord the King, in  
" the office of a Constable. You shall see and  
" cause his Majesty's peace to be well and  
" duly kept and preserved according to your  
" power. You shall arrest all such persons  
" as in your sight and presence shall ride or  
" go armed offensively, or shall commit, or  
" make any riot, affray, or other breach of  
" his Majesty's peace. You shall do your best  
" endeavour (upon complaint to you made,)

“ to apprehend all felons, barrators, and rioters, or persons riotously assembled :—And if any such offenders shall make resistance (with force) you shall levy hue and cry, and shall pursue them until they be taken.— You shall do your best endeavours that the watch in, and about, your town be duly kept for the apprehending of rogues, vagabonds, night-walkers, eyes droppers, and other suspected persons, and of such as go armed, and the like : And that hue and cry be duly raised, and pursued, according to the statute of Winchester, against murderers, thieves, and other felons : And that the statutes made for the punishment of rogues and vagabonds, and such other idle persons, coming within your bounds and limits, be duly put in execution. You shall have a watchful eye to such persons as shall maintain or keep any common house, or place where any unlawful crime is used : As also to such persons as shall frequent or use such places, or shall use or exercise any unlawful games, there or elsewhere, contrary to the statutes. At your Assizes, Sessions of the Peace, or Leet, you shall present, all and every, the offences done contrary to the statutes made to restrain the inordinate haunting and tippling in inns, alehouses, and other victualling houses, and for redressing drunkenness. You shall there

“ likewise true presentment make of all blood-  
“ sheddings, affrays, outcries, rescous, and  
“ other offences committed or done against the  
“ King’s Majesty’s peace within your limits.—  
“ *You shall, once every day, during your office,*  
“ *present, at the Quarter Sessions, all popish*  
“ *recusants within your parish, and their chil-*  
“ *dren above nine, and their servants, (i. e.*  
“ *their monthly absence from the church.) And*  
“ *you shall have a care for the maintenance of*  
“ *archery, according to the statute. You shall*  
“ *and duly execute all precepts and warrants*  
“ *to you directed from the Justices of Peace of*  
“ *this county, or higher officers. You shall be*  
“ *aiding to your neighbours against unlawful*  
“ *purveyances. In the time of hay or corn har-*  
“ *vest (upon request) you shall cause all persons*  
“ *meet to serve by the day, for the mowing, reap-*  
“ *ing, and getting in of corn or hay. You shall*  
“ *in Easter week, cause your parishioners to*  
“ *chuse surveyors for the mending of the high-*  
“ *ways in your parish. You shall have a care*  
“ *that the malt made or put to sale in your town*  
“ *be well and sufficiently made, trodden, form-*  
“ *ed, and dressed: And you shall well and duly*  
“ *according to your knowlege, power, and abi-*  
“ *lity, do and execute all other things belong-*  
“ *ing to the office of Constable so long as you*  
“ *shall continue in this office. So help you*  
“ *God.”*



▲

**TABLE OF FEES,**  
 taken by the  
**CLERK OF THE PEACE,**  
 FOR THE  
**Division of Kesteven, in the County of Lincoln.**

---

**FEES ON TRAVERSE:  
 DEFENDANT.**

	<i>£. s. d.</i>
Entering appearance .....	0 2 0
Copying indictment.....	0 2 0
Entering plea .....	0 2 8
Recognizances and filing .....	0 4 0
Drawing issue, folio, at 8d. per folio	0 0 0
Entering on the roll, ditto .....	0 0 0
Copy thereof, ditto .....	0 0 0
Record .....	0 6 8
Venire .....	0 2 6

N. B. The entry and copy of the issue are the same as the drawing, and the above fees are delivered with the copy of the issue to the defendant's attorney, out of which, the guinea paid on entering into the traverse is to be deducted: you also charge before entering appearance, the process by which defendant is brought into court, viz. *Venire Facias* 2s. 6d. and so on:—see Fees.

## OTHER FEES FOR DEFENDANT.

	£. s. d.
Sheriff for summoning and impan- neling jury .....	} 0 6 0
Verdict to be paid for to the jury in whose favour the traverse is.....	} 0 6 0

## OTHER FEES ON TRYING TRAVERSE.

Calling cause .....	0 4 0
Swearing jury .....	0 2 0
Reading record .....	0 2 0
Swearing witnesses, 4d. each.....	0 0 0
Verdict .....	0 4 4
Entering judgment.....	0 6 8
Discharge .....	0 4 8

## IF TRAVERSE IS NOT TRYED.

Then after Venire add,

Calling cause .....	0 4 0
Ordering for withdrawing plea....	0 4 0
Withdrawing it .....	0 2 0
Reading record.....	0 2 0
Discharge.....	0 4 8

APPENDIX.

FEES ON TRAVERSE.

PROSECUTOR'S FEES.

	£.	s.	d.
Indictment .....	0	2	0
Copy traverse 8d. per folio.....	0	0	0
Swearing witnesses, 4d. each.....	0	0	0
N. B. If either party desires a Subpœna, each Subpœna is 2s. 6d.			

CERTIORARI.

Allowing writ .....	0	6	8
Returning .....	0	2	0
Recognizance if not taken before a } judge .....	0	2	0
Drawing return 8d. per folio.....	0	0	0
Copy thereof 4d. per folio .....	0	0	0
Ingrossing, 4d. per folio.....	0	0	0

AD QUOD DAMNUM.

Reading writ, return, and inquisition	0	3	0
Petition for entering and recording } the same .....	0	2	0
Order thereon .....	0	4	0
Entry thereof, 8d. per folio .....	0	0	0

## APPENDIX.

	<i>L. s. d.</i>
Swearing every witness.....	0 0 4
Order of continuance when not fully heard .....	0 4 0
Final order to be paid for by the party in whose favor it is made..	0 4 0
Copy thereof (if required).....	0 2 0

---

**ORDERS OF REMOVAL NOT APPEALED  
AGAINST.**

Filing order.....	0 2 0
Reading .....	0 1 0
Swearing witness.....	0 0 4
Order .....	0 4 0

A

**TABLE OF FEES,**  
 Taken by the  
**CLERK OF THE PEACE,**  
**OF THE COUNTY OF NOTTINGHAM.**

---

	<i>£. s. d.</i>
<b>Pleading guilty or not guilty for pe- tit larceny, judgment and order thereupon.....</b>	1 4 4
<b>Discharging every person on recog- nizance to keep the peace, or to answer.....</b>	0 4 4
<b>Do. every person on recognizance in bastardy.....</b>	0 6 4
<b>A traverse tried the same day indict- ment is found.....</b>	2 8 8
<b>Others tried the Sessions after, 20s. in court.....</b>	1 0 0
<b>And on the trials.....</b>	2 12 0
<b>Every order of common length and copy and entering.....</b>	0 6 0
<b>If long and special, for drawing and entering.....</b>	0 6 0
<b>For the copy 3s. or 8d. a sheet.</b>	
<b>Common indictment in felony.....</b>	0 2 0
<b>And copy 1s. or 8d. a sheet.</b>	

	<i>L. s. d.</i>
Discharging every indictment for felony where found ignoramus.....	0 7 4
Dismissal of every person indicted for trespass, riot, assault, forcible entry, or the like, when bill found ignoramus for each.....	0 4 4
For the appearance and discharge of every person bailed for good behaviour, contempt, or the like...	0 8 8
For taking every such recognizance in Court.....	0 8 8
For every day given for repair of highways or bridges.....	0 4 0
For the allowance of every certificate for the repair thereof.....	0 3 0
And for pleading for the same .....	0 13 4
For filing certificates of the oath of a Knight of a Shire's qualification .....	0 2 0
For drawing every special indictment.....	0 3 4
For the copy 2s. or 8d. a sheet at any election .....	0
The sum in informations.....	
Every certificate of loss by fire....	0 10 6
For certifying every record of conviction .....	1 0 0
For examining and entering on the file, estimate for a brief.....	0 10 6

	£. s. d.
For certificate of every person indicted	0 2 0
For each name.....	0 2 0
Inrolling every instrument 8d a sheet	
For every search .....	0 3 6
For every certificate.....	0 3 6
Entering deputation, if Lord pays..	0 2 6
if keeper pays	0 1 0
Bench warrant, each name .....	0 4 0
Discharging every high constable}	0 2 0
and treasurer out of office.....	
Copy and entering .....	0 2 0
Attending Quarter Sessions each }	0 2 0
day, myself.....	
For certifying every recognizance..	0 6 0
For submission to every indictment}	0 13 4
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Each defendant, if laid severally..	0 13 4



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